TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 104.

WILLIAM H. WHITE, PLAINTIFF IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JULY 29, 1908.

(21,420.)

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

CITY OF NORFOLK
v.
WHITE.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the City of Norfolk, a municipal cerporation chartered under the laws of this State, respectfully represents unto your honors that it is aggrieved by a decree of the Circuit Court of the City of Norfolk entered on the 10th day of May, 1907, in a certain suit in Chancery wherein your petitioner was defendant and W. H. White was complainant. A transcript of the record in said case is presented herewith and from it will appear the following facts:

In the year 1792 the City of Norfolk then the Borough of Norfolk, being the owner of an area of land in the present City of Norfolk known as "Town Point Land," laid off said land under one general plan and leased said property under perpetual leases (that is, leases for 99 years renewable forever), to various individuals, of whom one, William Williams, through whom the plaintiff here claims, leased Lot No. 9 of said Town Point Land. Said lands were leased by certain commissioners named by the Common Council of said city under a plan offered by one Campbell. The commissioners reported the terms and conditions on which they had leased said lands and on which they had leased Lot No. 9, herein involved, and among said conditions upon which said Lot No. 9 was leased

2 "Was that the public and other taxes accruing or to accrue on the several lots after this day are to be paid by lessees." After said report of said commissioners the proper authorities of the city or borough authorized the mayor to join with a committee from the Common Council in making the lease of said Lot No. 9 with other lots to other parties, and the Common Council appointed a committee to join with the mayor in making said leases "agreeable to the report made by the commissioners." In accordance with these proceedings in the year 1792, Lot No. 9 was leased for a period of 99 years, renewable forever, to William Williams, his executors, administrators and assigns, in consideration of certain covenants and agreements and a yearly rent of 37 pounds, 7 shillings and 6 pence. and among the covenants in said lease was one to the effect that the said Williams, his executors, administrators and assigns would pay or cause to be paid to the person or persons authorized to receive the same the "public and other taxes" which shall accrue on said land. In the year 1890 the Common Council of the City of Norfolk, after reciting that the lease to William Williams was about to expire and that Elizabeth F. Sergeant was then the owner of said lease and desired a renewal of the same according to the terms thereof, and had petitioned the Councils accordingly, passed a resolution as follows:

"Be it therefore resolved by the Common and Select Councils of

the City of Norfolk, that the presidents of the Common and Select Councils of the City of Norfolk be, and they are hereby authorized and instructed to execute on behalf of the City of Norfolk, as the legal successor of the Borough of Norfolk, a renewal of the said lease for another term of 99 years, renewable forever, according to the terms thereof, to the said George H. Sergeant, trustee (for Elizabeth G. Sergeant), his executors, administrators and assigns in such form as may be approved by the city attorney; and that the said city treasurer be, and he is hereby, authorized and instructed to affix the seal of the City of Norfolk to the said renewal lease when the same shall have been so executed, and to deliver the same to the said Elizabeth F. Sergeant or her agent or attorney."

At a later date in said year the presidents of the Common and Select Councils of the City of Norfolk joined in a renewal lease, in which was cited in full the last aforementioned resolution of the Councils, in strict accordance with said resolution except that in the place of the covenant to pay all public and other taxes thereon, the following covenant was inserted "And further that the said George H. Sergeant, trustee as aforesaid, his successors and
3 assigns, will pay or cause to be paid to the person or persons authorized to receive the same all taxes State and national which shall accrue on the said land. And also will keep and perform each and all the other covenants in said original deed contained (meaning thereby the original lease) and by the lessee therein named, his heirs and assigns be kept and performed." And on the same date said George H. Sergeant, trustee, and Elizabeth F. Sergeant transferred said lease to W. H. White, the appellee.

On the Lot No. 9 herein involved, improvements of great value have been placed, and in the year 1903 the City of Norfolk assessed said land for taxation to the City of Norfolk, and the building thereon to W. H. White, the appellee; and to prevent the collection of said taxes the bill was filed in this cause and a perpetual injunction made by the decree complained of against the collection of said taxes from said W. H. White. Said W. H. White further relied upon the fact that the said City of Norfolk had in previous years attempted to assess said property for taxation and that the Corporation Court of the City of Norfolk had entered orders declaring it erroneously assessed and had relieved him from said taxation and that therefore the question involved was *res adjudicata*.

Res adjudicata not now insisted upon.

1.

On the facts above stated appellee relied upon the covenant in his lease that he was to pay only the State and national taxes, but as the court below distinctly held that it was the intention of the parties under said lease that the lessee should pay public and other taxes mentioned in the original lease of Lot No. 9 to William Williams, this question deserves only a passing notice.

It is clear that when said renewal lease was executed it was the intention of all the parties thereto that the terms and conditions thereof should be the same as those contained in said original lease,

and especially that the covenant or condition contained in said original lease to the effect that the lessee would pay the public and all other taxes should also be contained in said renewal lease; and it is equally as clear from the recitation in said renewal lease of the resolution of the Councils that the said W. H. White and his grantor took with knowledge of such intention and are bound thereby. And if this were not true, yet the covenant in the renewal lease now owned by said White, that he would "keep and perform each and all the other covenants in said original deed contained and by the lessee named therein, his heirs and assigns to be kept and performed" bound him to the covenant contained in the original lease to pay "all public and other taxes."

As noted above, the court below had no difficulty on this question and we do not go into the same at length.

2.

As to the contention that the orders entered by the Corporation Court released this land from taxation forever on the ground that it is *res adjudicata*, it cannot be sustained. The orders filed to sustain this contention cannot bear the interpretation that the point involved herein was decided there, and it is very doubtful if the Corporation Court, under the statute to correct erroneous assessments, had jurisdiction to pass upon the question involved in this suit even had it attempted to do so. But even if we were to admit that the exact point was decided yet in matters of taxation the decision only applied to the taxes for that year and not to taxes for other years. This is overwhelmingly established by all the authorities although the inclination of the Supreme Court of the United States might seem at first blush to be against it. The question has been recently reviewed by the Supreme Court of Georgia in Georgia R. & Banking Co. v. Wright, 53 S. E., 251, 255, where the court says:

"In 2 Cooley on Taxation, 845, it is said: 'Upon the question whether a judgment establishing a liability to pay taxes for certain years is, in a subsequent action between the same parties, *res adjudicata* as to the liability for taxes of a succeeding year when the facts affecting the liability are the same in the two cases, the authorities do not agree. It is held in Iowa, Kentucky, Michigan, Mississippi, and Tennessee that the judgment for a tax is conclusive as to that tax merely, and in suits for taxes of other years is important only as a precedent (citing Davenport v. Chicago R. Co., 38 Iowa, 633, 640; Newport v. Commonwealth (Ky.), 50 S. W. 845, 45 L. R. A., 518; s. c. 51 S. W., 433, 45 L. R. A., 518; Louisville Bridge Company v. Louisville (Ky.), 58 S. W., 598; s. c. 65 S. W., 814; Michigan R. Co. v. Auditor General, 9 Mich., 448; Lake Shore R. Co. v. People, 46 Mich., 193, 9 N. W., 249; Adams v. Yazoo R. Co., 77 Miss., 194; 24 South., 200, 317; 28 South., 956; 60 L. R. A., 33; State v. Bank, 95 Tenn., 222; 31 S. W., 933; Union Bank v. Memphis, 101 Tenn., 154; 46 S. W., 557). Recent decisions of the Federal Supreme Court maintain the contrary doctrine, but have not met the approval of the State tribunals.'"

5 In Keokuk R. Co. v. Missouri, 152 U. S., 301; 14 Sup. Ct., 592; 38 L. Ed., 450, relied upon by counsel for the railroad company in the present case, it was held that "a suit for taxes for one year is no bar to a suit for taxes for another year"; and in the opinion Mr. Justice Brown said: "The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac., 94 U. S., 351; 24 L. Ed., 195. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. * * * In the case of Davenport v. Chicago R. Co., 38 Iowa, 633, 640, the Supreme Court, of Iowa, held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the tax for a subsequent year; each years's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action (as two promissory notes) forming the subject matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * * Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision." As indicated by the quotation which we have made from Cooley on Taxation, however, the Supreme Court of the United States has not adhered to the principles announced in the case cited. See New Orleans v. Citizens Bank, 167 U. S., 371; 17 Sup. Ct., 905; 42 L. Ed., 202; Baldwin v. Maryland, 179 U. S., 220; 21 Sup. Ct., 105; 45 L. Ed., 160; Deposit Bank v. Frankfort, 191 U. S., 499; 24 Sup. Ct., 154; 48 L. Ed., 276. In Newport v. Commonwealth (Ky.), 50 S. W., 845; 45 L. R. A., 518, it was held that a judgment for the defendant in an action to recover taxes for one year is not a bar to an action to recover taxes on the same property for another year. Hazelrigg, C., and Burnam, J., concurred in a separate opinion on this branch of the case,

6 which is reported in 51 S. W., 433. 45 L. R. A., 518, and from which the following forcible language is quoted: 'The power to tax is a high governmental power exercised against the will of the person taxed, and, in our opinion, a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication would

in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties. As matter of public policy, and upon grounds of public necessity, we think the principle of *res adjudicata* ought not to be applied to questions of taxation where the State is exercising its sovereign power."

3.

The other contentions made in this case are the same made in the case of the City of Norfolk v. J. W. Perry Company, a corporation, and John L. Roper, in which an appeal has been recently granted by this court, and we shall reiterate here the argument made in the petition in that cause.

The appelle claims that the taxes levied by your petitioner were illgal on several grounds, as follows:

a. That the taxes were not assessed properly in that they were not assessed to the proper person, to-wit, the complainant, even if otherwise taxable; and in that the land and the building were assessed separately and this could not be done.

b. That the City of Norfolk being the technical fee simple owner of the land, and the building thereon following the land as a matter of course under the lease and becoming the property of the City of Norfolk if the lease were violated, could not tax its own property or add to the burdens of its lessee by such taxation. In other words that the city could not tax itself on its own property and that in law under the technical rule applicable to landlord and tenant this was the city's property and was therefore exempt.

c. That the covenant in the lease to pay all "public taxes" did not apply to city taxes because at the time it was made the city did not levy taxes on this property and that the covenant did not therefore apply to these taxes even if they were otherwise leviable.

d. That the levying of these taxes impaired the obligation of the contract of lease and such levy and assessment were unconstitutional.

It is proposed to consider these contentions in the order named.

7 A.

As to the first contention that the property was wrongfully assessed in the name of the wrong person and because the building was separated from the land. The first observation that your petitioner makes is that this could have been easily remedied by a motion to correct said assessments and to have them taxed in the proper names under the statute and that a court of equity has no jurisdiction to enjoin the collection of the taxes on this ground.

In Cooley on Taxation, (3rd ed.) p. 1440, it is said:

"A tax will not be restrained on the ground merely that it is irregular or erroneous. Errors in the assessment do not render the tax void nor are they necessarily injurious. As a rule therefore they do not constitute any reason whatever against the taxes being

enforced; moreover the law has provided remedies for all such mere irregularities and errors as do not go to the foundation of the tax and parties complaining must be confined to these."

Applying this law specifically we find the Supreme Court of the United States in New Orleans v. Stemper, 175 U. S., pp. 309-11, using the following language:

"A preliminary question made by the plaintiff is that she had applied to have the assessment in the name of the estate of McCan stricken off on the ground that the administration of the estate had been finally closed and the property put into the possession of the heirs, which application was denied; that therefore the assessment was in the wrong name and could not be sustained. We are of opinion, however, that there was no error in the ruling of the Circuit Court in this respect, for, conceding that as a matter of fact the assessement was in the wrong name, the error is not one that will justify the equitable relief by injunction."

In Hibernian, etc., Soc. v. Kelly, (Ore.), 52 Am. St. Rep. 709, the same principle is laid down, the court saying:

"We understand the rule to be that a court of equity will not interfere by injunction to restrain the collection of a tax, merely because of the alleged illegality or irregularity appearing upon the face of the assessment, but will leave the party to his remedy at law."

And this was a case of failure to assess in the right name. These same principles apply to the failure to assess the land and building together instead of separately, and certainly if the land was taxed at a fair value complainants had no ground to complain as
8 to the tax on land that it did not include the value of the building also, and even if the tax on the building should have been enjoined the tax on the land was valid and should have been paid. Again it is to be noted that courts of equity when called upon to enjoin a tax partly legal and partly not make it a condition of granting the injunction that the plaintiff shall pay and tender such taxes as are due legally. Says Cooley on Taxation (3rd ed.), pp. 1424-1427:

"Thus where an injunction has been applied for to restrain the collection of a tax partly legal and partly not, the court has made the payment of the legal a condition precedent and it has been strongly intimated in a case where it was alleged the assessment had by fraud been made too high that the payment of what the party conceded would be his just proportion should be required before injunction order issued, in order that the proceedings may be as little as possible injurious to the public interest. The general rule requiring payment or tender of payment.

The amount actually due as a condition to relieve against the illegal part of the tax has, however, no application to a case where the entire tax fails by reason of an illegal (not irregular) assessment."

(The words in brackets above are ours.)

Considering, therefore, the contention of the complainants on the ground of irregularity in the assessment because assessed to the

wrong owner and because the building and the land were assessed separately instead of together it must be concluded, your petitioner thinks, that neither of these grounds furnish a reason for relief by injunction.

B.

The second contention of the complainants—and the one on which the court below proceeded—is as purely a technical ground as might be imagined. Petitioner concedes the general rule that in the absence of a covenant and under ordinary leases the landlord is responsible for taxes on the property leased by him to the tenant although he is not responsible for an increase of taxation due by reason of improvements put upon the ground by the tenant. While this is the general rule petitioner contends and insists that it has no application to a case of a perpetual lease-holder where the tenant is in effect the real owner of the property and entitled to the use thereof forever, and where the tenant is the virtual owner of the land. In this latter case in matters of taxation the mere legal title which remains in the landlord for purposes of security is disregarded and the tax on the property placed where it belongs, viz., on the lessee who is the virtual owner, who has the
9 benefit of any increase in the value of the land, who as such must bear all losses from depreciation in the value of the land and who in truth and despite legal fiction is the real and substantial owner. In other words the contention of your petitioner is that these complainants holding this land under perpetual lease are the owners thereof, that the law will disregard the mere naked fiction of a legal title in the landlord and will place the burden on him who gets the benefit. Take the case at hand where property is rented for $124.58 a year and the taxes thereon amount to $255.00, in what position does a landlord find himself, where he can never get back his lot and where this increase in value goes always to benefit the tenant, and where it is utterly impossible that he can ever reap the benefits proceeding from the appreciation of the value of the property. His legal title would be a burden instead of a benefit if such were the law. Not only is this true here but we also have, as we shall show later on, a covenant to pay these taxes. A case almost in point on this question, the difference being merely one of degree and that a very slight degree, is Wells v. Savannah, 181 U. S., 531. The facts of the case cited were, the City of Savannah in 1790 owned certain property known as Common Lots and in that year took steps to dispose of the same. The manner of disposing of them adopted was that they were put up at public outcry and the highest bidder was to have the lots, but if the bidder instead of making a cash payment paid a ground rent quarterly he might retain the lot forever on the payment of such ground rent, and at any time thereafter might pay the original valuation with what rent was due, extinguish the ground rent and call for a fee simple, the city retaining a right of re-entry for non-payment of rent. The plaintiff in that case held a lot paying the ground rent with a right to purchase, and while it was in this con-

dition the City of Savannah levied a tax thereon and the question was whether the city could tax the property. The court will note that the legal title to that propery was in the city, that the only relation existing between the owner and the city was that of landlord and tenant forever, and under a perpetual lease as here, with a right or option in the tenant to purchase on certain conditions. The only difference in substance between that case and the case at bar was that the tenant there had a right to purchase and here he had none. There was also a covenant in that case on the part of the city that the tenant should have quiet possession, etc. The Supreme Court of the United States held that the lands were taxable, saying on page 544:

"The purchasers of these lots became to all intents and purposes their owners, as they had the right to their possession, use and occupation forever upon payment of the rent and they could assign or devise the same and their assignees or devisees would take good title and their heirs would also take in case there was no assignment or devise. They could also at their discretion and on the payment of the money agreed upon become the owners in fee."

The court also quotes what Chief Justice Bleckly had to say upon the question in the Supreme Court of Georgia, and as it would be presumptious to attempt an improvement in the statement of a legal proposition made by Chief Justice Bleckly, we quote a part of what the Supreme Court of the United States quoted from him *in extenso*. He says:

"The value of property consists in its use, and he who owns the use forever, though it be on a condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all land in the world.

Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes. Land sold or by a contract of bargain and sale demised forever subject to a perpetual rent, is taxable as corporeal property; and in private hands the rent also is taxable as an incorporeal hereditament. The tax on the former is chargeable to the purchaser or perpetual tenant, and on the latter to the owner of the rent. The corporeal property in such case is at the direct risk of the purchaser; he alone sustains the losses of depreciation in value, and he alone takes the benefit of appreciation. The vendor risks only the fixed rent or the fixed purchase money, and neither of these will ever become more or less by anything which may happen to the premises. Only his security, not his property, will be affected thereby. It is to be assumed that the whole contract between the parties will be observed, not broken, and their true relation to the property is to be determined on that assumption. Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere

lessee but a purchaser admitted into possession on the faith of his contract of purchase. Such were the contracts involved in the present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold forever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and is
11 the equivalent of interest at a moderate rate per annum on the unpaid purchase money. In all essential respects, so far as liability for taxes is concerned, these purchasers are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held."

It is to be noted that Chief Justice Bleckly says in this excerpt that the tax on the corporeal property, to-wit; the land, should be chargeable to the purchaser or tenant, and while it is true that in our case it is chargeable to the city or assessed in the name of the city, yet we have already shown, we hope, that this mere irregularity in assessment does not entitle the complainants to equitable relief.

If it is true therefore that a lessee under a perpetual lease is regarded as the owner of the corporeal property, the question as to the right of the City of Norfolk to tax property of which it has the legal title does not arise because even if it was true that a city could not tax its own property the rule does not apply here for the simple reason that the complainants are the real owners and not the city, and the mere fact that the city holds the naked legal title should not preclude it on general principles from taxing the property. The reason for the rule that a city cannot tax its own property as laid down by all the authorities is that it would be a useless and idle thing and would only give tax officers fees without any benefit to the city, the city in such a case simply transferring money from itself to itself (if that were possible), and paying its officers fees for doing so. In Gray on Limitations of the Taxing Power, sec. 1340, the reason for the rule is stated thus:

"It would be manifestly absurd for the State to tax itself, to take the money out of its treasury with which to pay taxes back to the treasury, which is all such taxation would amount to."

And in Cooley on Taxation (3rd ed.), p. 263, in speaking of the exemption of public property from taxation the reason for the rule is stated thus:

"All public property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefitted but the officers employed, whose compensation would go to increase the useless levy."

But as before stated no such reason exists here for such a rule because here the city does not pay the taxes but the lessee of a perpetual lease-holder, who is the virtual owner, and who holds under a covenant to pay all public taxes, would pay the city something and

the city would derive a benefit and it would not be a case of
12 a city taxing itself to pay itself taxes, and the maxim *"Ratio est legis anima, mutata legis ratione mutatur et lex,"* applies. It is not, however, admitted but is on the contrary contended by your petitioner that under the present Constitution of Virginia a city is required to tax all property owned by itself and not held for public purposes. The basis of the rule exempting public property from taxation is that it is held for public purposes, and when it is held for private purposes and a revenue derived therefrom as in this case, the basis for the exemption fails, and the city in paying its taxes would pay from the revenue which it derived from property held in its private capacity, and that property should be considered in making up the tax rate in order that there might be equality and uniformity in taxation. This would be true, petitioner thinks, even under the law without the constitutional provision and when the constitutional provision itself is considered it becomes doubly apparent. The constitutional provision referred to is sec. 183 of the Cons. which provides that no other property shall be exempt from taxation, State and local, except property directly owned by the State, however held, and property lawfully held and owned by counties, cities, towns or school districts used wholly and exclusively for county, city, town or public school purposes, and certain other property not having a bearing upon the questions in this case. This is a direct mandate of the constitution requiring the taxation of this property and it is only by a construction of the most hair-splitting kind that it can be avoided. As bearing upon this question it is to be noted that it is provided in sec. 183 of the Cons. that "nothing therein contained shall be construed as authorizing or requiring any county, city or town to tax for county, city or town purposes, in violation of the rights of the lessee thereof existing under any lawful contract heretofore made, any real estate owned by such county, city or town and heretofore leased by it." This demonstrates that unless it violates the contract with the lessee, the city was required to tax property leased by it and there is no violation of the contract of lease in this case.

Before we leave the second contention of the complainants it is well to call attention to the point that certainly the building on this land was taxable to the lessee even under the general rule applicable to ordinary leases as to taxes between landlord and tenant. To say that the building erected by a tenant under such a lease as this before default made and re-entry becomes the property of the lessor is fallacious in the extreme and the courts have always held even under ordinary leases that increase in taxation due to the erection of improvements by the lessee, should, to the extent of such in-
13 crease, be paid by the lessee during the term. In 18 Amer. & Eng. Enc. of Law (2nd ed.), p. 651, the general rule is laid down:

"When the taxable value of the premises is greatly enhanced by improvements erected by the lessee, the lessor is not bound, between himself and his tenant, to pay the additional taxes caused by such

improvements; and if he is required to pay such additional taxes he may compel the lessee to reimburse him."

If this were not true it would result, as pointed out in Watson v. Home, 14 Eng. Com. Law, 45, that a tenant might so improve a lessor's property that the taxes would more than consume rents and the landlord, to speak in common parlance, would be in a hole. This principle has been recognized in Virginia in the case of Mayo v. Carrington, 19 Gratt. 74, where the syllabus is as follows:

"The leased property when sold was only valuable for the sand taken from it. The purchaser builds upon it and makes extensive improvements. He is entitled to deduct from the rent the taxes upon the property as he purchased it but not the taxes occasioned by his improvements."

The exact distinction we make here as to the building has been made in Louisiana in the case of Burband v. Board, 29 Sou. 947, the syllabus of which is as follows:

"The plaintiff as lessee of the City of New Orleans having contracted to build upon two vacant and unimproved lots of ground certain specified buildings, as a part of the consideration of the lease in addition to money, rent, the buildings to revert to the lessor on the termination of the lease at the expiration of twenty years, said buildings and improvements are subject to taxation by the city in the meantime."

This last case sustains our contention entirely that, during the currency of the lease at any rate, the buildings are the property of the lessee and he should pay taxes thereon.

It may be well also to observe at this point that the city could not increase its rate in levying this tax by placing upon the property any amount of tax it wished to. It had necessarily under the law to tax it at the same rate that was imposed on other real estate in the city based upon its value in the assessment for taxation for State purposes. It will also be noted in connection with this contention of complainants' that Mr. Cooley, in one of the quotations which we have made from him, has decided that the State could tax public property, or give authority to a city to tax its public property if it desired to do so. And our court has decided (Norfolk v. Norfolk Landmark, &c. Co., 95 Va. 564) that the City of Norfolk might tax all subjects within its jurisdiction not withheld from
14 taxation by the Legislature, whether the State taxes them or not, and under the authority thus given the City of Norfolk it had the right to tax this property if it wished to, and we contend that under the Constitution of Virginia, sec. 183, above, it was compelled to tax it.

We conclude our observations on this contention by a reference to the case of Hart v. Cornwall, 14 Conn. 228, which is almost identical on this point. In that case the Legislature of Connecticut had granted the town of Cornwall a tract of land for the use of the ministry forever. About twelve years after this grant the town of Cornwall leased the land for the term of 999 years, free of all incumbrances, except all rents or public taxes that might arise thereon to be paid and satisfied by the lessee. The town taxed this land

and a question arose as to the right of the town to tax. It seems that the town of Cornwall had the same power in Connecticut that the town of Norfolk has in Virginia. (Norfolk v. Norfolk Landmark Company, 95 Va. 564.) See opinion in the Cornwall case, pp. 233-234, and the court held that in as much as the State could tax it the city could tax it.

C.

We shall consider the third and fourth contentions of the complainants together.

The trial court did not uphold these contentions or pass upon them, but decided the case on the second contention which we have noted, and in which we submit the court erred; but as these questions are still open it is necessary that we notice the same.

The covenant by the lessee to pay all public or other taxes not only covered taxes imposed at the time of the lease but all taxes to arise in the future which might be imposed under the law; and at any rate the city had no power to exempt these lands from taxation.

Whiting v. Town of West Point, 88 Va. 905.

That the words "public taxes" covered taxes levied by the City of Norfolk is clear. In Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506-510, the court says:

"We think that the current of the authorities in this State and in some of our sister States runs to this result; that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed for some public or general use or purpose in which he has no direct, immediate and peculiar interest; being exactions from him toward the expenses of carrying on the government, either directly and in general that of the whole Commonwealth, or more mediately and particularly through the intervention of municipal corporations.

15 D.

Your petitioner therefore submits that the court in the decree complained of erred and it therefore prays that an appeal and supersedeas from said decree may be allowed him and that said decree may be reversed and annulled and a decree entered dismissing or directing the dismissal of the complainants' bill, and it will ever pray,

CITY OF NORFOLK,
By NATH'L T. GREEN, *Counsel*

J. F. DUNCAN,
RICHARD McILWAINE, JR.,
NATH'L T. GREEN, *p. p.*

I, Nathaniel T. Green, an attorney practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the decrees complained of in the foregoing petition are erroneous and should be reversed and annulled.

Given under my hand this 9th day of September, 1907.

NATH'L T. GREEN.

Petition and record received September 10, 1907.

R. H. C.

SEPTEMBER 12, 1907.

Writ of error and supersedeas; bond, $250.00.

R. H. CARDWELL.

To clerk Supreme Court of Appeals, Richmond, Va.

16 VIRGINIA:

Pleas before the Circuit Court of the City of Norfolk on Friday the 10th Day of May, 1907.

Be it remembered, that heretofore, to-wit: in the clerk's office of the said Circuit Court of the City of Norfolk, at the rules held for said court on the third Monday in January, 1906, came William H. White, the plaintiff, and filed his bill in chancery against W. L. Baker, City collector, and the City of Norfolk, defendant, in the following words:

In the Circuit Court of the City of Norfolk, Virginia.

WM. H. WHITE
v.
W. L. BAKER, City Collector, and THE CITY OF NORFOLK.

Hon. R. R. Prentis, judge of said court:

Your orator, Wm. H. White, respectfully shows unto your honor the following case:

1st. Your orator is assignee of the lessee of a certain ninety-nine year lease made by the City of Norfolk to George H. Sargeant, trustee for Elizabeth F. Sargeant, and dated the 25th day of September, 1890. By the said lease the City of Norfolk leased the property known as Lot Number Nine (9) on the Town Point land for a period of ninety-nine years from August 26, 1891, said lot being bounded and described as follows:

Beginning at the intersection of said lot with the Main and Fayette streets; running thence southerly one hundred and twelve feet on Fayette street, to the intersection with Kelley's street; thence westerly forty-two feet, nine inches on said street to the intersection with Lot Number Ten (10); thence northerly one hundred and thirteen feet on the line of the lot Number Ten (10); to the intersection with the Main street; thence easterly fifty-seven feet six inches to Main street to the beginning station.

It was also provided by the terms of said lease that the lessee or his assigns should pay the sum of $124.58 at the end of every year during said term and should also pay to the person or persons authorized to receive the same, taxes, State and national, which should accrue on said land.

2d. Your orator further states that he has paid the said yearly rent under said lease as the same has accrued, and has paid the State taxes

on said land and had been prepared to pay the national taxes
17 had any been imposed by the national government, but no taxes on said land have been imposed during said term by the national government. Your orator further states that he has otherwise kept and performed all of the provisions and covenants of said lease which by the lease he was required to keep and perform.

3rd. Nevertheless, your orator charges that the City of Norfolk has imposed taxes on the building on said land, for the benefit of itself, said building having been erected by your orator, and that W. L. Baker, City Collector of the City of Norfolk, did on the 11th day of December, 1905, levy upon the furniture of your orator at his office in the Citizen's Bank Building, in the City of Norfolk, for the taxes for the year 1903, the said furniture consisting of the following articles: One oak desk, one oak filing case, five office chairs, and one office sofa, and that the said W. L. Baker threatened to advertise and sell the said furniture for the said taxes, which said taxes the City of Norfolk alleges to be $255.00 with 5 per cent. penalty and 6 per cent. interest on the said $255.00 from February 1, 1904, until paid.

4th. Your orator further alleges that the said property was attempted to be sold by the City of Norfolk on the 1st day of September, 1902, for taxes levied by the City of Norfolk on the same for the year 1900, and that the same was bought in at the said sale by the City of Norfolk.

5th. Your orator further alleges that the levy made by the said W. L. Baker for taxes as aforesaid, was illegal and that your orator will suffer irreparable damages unless the said W. L. Baker, city collector, and the City of Norfolk, are enjoined from advertising and selling the property levied on as aforesaid. Your orator being without any adequate remedy at law, therefore prays that the said W. L. Baker, city collector, and the City of Norfolk may be made parties defendant to this suit and be required to answer the same, but an answer under oath is expressly waived, and that an injunction be granted restraining the said City of Norfolk and W. L. Baker, city collector, and all other persons, from advertising and selling the property levied on as aforesaid, and that your orator may have such other relief as the nature of this case may demand and to equity shall seem meet, and your orator will ever pray, etc.

WM. H. WHITE.
By LOYALL & TAYLOR, *Att'ys.*

18 STATE OF VIRGINIA,
City of Norfolk, To wit:

This day personally appeared before me, Walter H. Taylor, agent for Wm. H. White, who made oath that the facts contained in the above bill are true to the best of his information and belief.

G. M. PAYNE,
Notary Public.

My commission expires August 17, 1906.

VIRGINIA:

Pleas before the Circuit Court of the City of Norfolk at the Court-house Thereof on —— the — day of ——, 1907.

Be it remembered that heretofore, to-wit: In the Circuit Court of the City of Norfolk, on the 30th day of December, 1905, came the plaintiff, Wm. H. White, praying for an injunction against W. L. Baker, City Collector, and the City of Norfolk, defendants, which was granted in the following words:

WM. H. WHITE
v.
W. L. BAKER, City Collector, and THE CITY OF NORFOLK.

On motion of the plaintiff, by counsel, an injunction is hereby awarded enjoining and restraining the defendants, W. H. Baker, City Collector, and the City of Norfolk, their agents and employees and all others from advertising for sale and selling the property of Wm. H. White levied on by the said W. L. Baker, City Collector, on December 11, 1905, until the further order of this court.

But the said injunction is not to take effect until the plaintiff in this suit or some one in his behalf, shall enter into a bond with sufficient security before the clerk of this court, in the penalty of $500.00, conditioned to pay all costs that may be awarded against the said Wm. H. White and all such damages as may be incurred in case this injunction shall be dissolved.

And at another day, to-wit: In the clerk's office of the said Circuit Court, at the rules held for said court on the third Monday in January, 1906, came William H. White, the plaintiff, and filed his bill in chancery against W. L. Baker, City Collector, and the City of Norfolk, defendants, in the following words:

19 In the Circuit Court of the City of Norfolk, Virginia.

WM. H. WHITE
v.
W. L. BAKER, City Collector, and THE CITY OF NORFOLK.

Hon. R. R. Prentis, judge of said court:

Your orator, Wm. H. White, respectfully shows unto your honor the following case:

1st. Your orator is assignee of the lessee of a certain ninety-nine year lease made by the City of Norfolk to George H. Sergeant, trustee for Elizabeth F. Sargeant, and dated the 25th day of September, 1890. By the said lease the City of Norfolk leased the property known as Lot Number Nine (9) on the Town Point land for a period of ninety-nine years from August 26, 1891, said lot being bounded and described as follows:

Beginning at the intersection of said lot with the Main and Fayette streets; running thence southerly one hundred and twelve feet on Fayette street, to the intersection with Kelly's street; thence westerly forty-two feet, nine inches on said street to the intersection with Lot Number Ten (10); thence northerly one hundred and thirteen feet on the line of the lot Number Ten (10); to the intersection with the Main street; thence easterly fifty-seven feet six inches to Main street to the beginning station.

It was also provided by the terms of said lease that the lessee or his assigns should pay the sum of $124.58 at the end of every year during said term and should also pay to the person or persons authorized to receive the same, taxes, State and national, which should accrue on said land.

2d. Your orator further states that he has paid the said yearly rent under said lease as the same has accrued, and has paid the State taxes on the said land and had been prepared to pay the national taxes had any been imposed by the national government, but no taxes on said land have been imposed during said term by the national government. Your orator further states that he has otherwise kept and performed all of the provisions and covenants of said lease which by the lease he was required to keep and perform.

3rd. Nevertheless, your orator charges that the City of Norfolk has imposed taxes on the building on said land, for the benefit of itself, said building having been erected by your orator, and that W. L. Baker, City Collector of the City of Norfolk, did on the
20 11th day of December, 1905, levy upon the furniture of your orator at his office in the Citizen's Bank Building, in the City of Norfolk, for the taxes for the year 1903, the said furniture consisting of the following articles: One oak desk, one oak filing case, five office chairs, and one office sofa, and that the said W. L. Baker threatened to advertise and sell the said furniture for the said taxes, which said taxes the City of Norfolk alleges to be $255.00, with 5 per cent. penalty and 6 per cent. interest on the said $255.00 from February 1, 1904, until paid.

4th. Your orator further alleges that the said property was attempted to be sold by the City of Norfolk on the 1st day of September, 1902, for taxes levied by the City of Norfolk on the same for the year 1900, and that the same was bought in at the said sale by the City of Norfolk.

5th. Your orator further alleges that the levy made by the said W. L. Baker for taxes as aforesaid, was illegal and that your orator will suffer irreparable damages unless the said W. L. Baker, city collector, and the City of Norfolk, are enjoined from advertising and selling the property levied on as aforesaid. Your orator being without any adequate remedy at law, therefore prays that the said W. L. Baker, city collector, and the City of Norfolk may be made parties defendant to this suit and be required to answer the same, but an answer under oath is expressly waived, and that an injunction be granted restraining the said City of Norfolk and W. L. Baker, city collector, and all other persons, from advertising and selling the property levied on as aforesaid, and that your orator may have such

other relief as the nature of this case may demand and to equity shall seem meet, and your orator will ever pray, etc.

WM. H. WHITE,
By LOYALL & TAYLOR, *Att'ys.*

STATE OF VIRGINIA,
City of Norfolk, To wit:

This day personally appeared before me, Walter H. Taylor, agent for Wm. H. White, who made oath that the facts contained in the above bill are true to the best of his information and belief.

G. M. PAYNE,
Notary Public.

My commission expires August 17, 1906.

21 And at another day to-wit: In the Circuit Court aforesaid, on the 11th day of June, 1906:

On motion of the defendant, the City of Norfolk, leave is given it to file *his* answer in this cause, and the same is accordingly filed.

The following is the answer of the defendant, the City of Norfolk, filed herein by leave of the foregoing decree:

In the Circuit Court of the City of Norfolk.

WILLIAM H. WHITE
v.
W. L. BAKER, City Collector, and THE CITY OF NORFOLK.

The Answer of the City of Norfolk, One of the Defendants to the Bill of Complaint of William H. White, Filed Against it and Another in the Circuit Court of the City of Norfolk.

This defendant reserving to itself all right of exception to the said bill of complaint, for answer thereto, says that the statements contained in paragraph one of said bill, with the exception of the date of the lease from the City of Norfolk to Sargeant, trustee, are true in so far as the mere statements are concerned, but said paragraph, purporting to give the status of the said plaintiff in his relation to the land in the bill mentioned, contains by no means all the facts in connection therewith, is meagre to a fault, and for that reason is misleading.

The facts are as follows:

The city, then borough of Norfolk, in the year, 1792, being the owner of a large area of land in the City of Norfolk, known as Town Point Land, laid off said area into lots and by certain resolutions of its common council and court of aldermen, under one general plan, leased said lots to various individuals, of whom was one William Williams, through whom the plaintiff herein has the lease on lot No. 9 on said Town Point Land.

A resolution of May 31, 1792, of said common council authorized certain commissioners therein named to advertise the letting

out of said Town Point Land on a day named therein for ninety-nine years, renewable forever.

On July 16, 1792, it was resolved by said Common Council that the commissioners lease out said land, according to the plan offered by one Campbell, "on such terms and in such manner as they may think most conducive to the interest of the corporation."

On August 24, 1792, the commissioners made report of the proceedings of said common council, which was read, approved
22 and ordered to be recorded. Said report contains the conditions fixed upon by the commissioners for letting out said Town Point lots, among said conditions being No. 9, as follows: "The public and other taxes accruing or to accrue on the several lots after this day are to be paid by the lessees." The commissioners further reported that pursuant to authority before that time vested in them they had proceeded to let said land out on lease, subject to said conditions, and that among the successful bidders for said leases was said William Williams for lot No. 9.

On September 10, 1792, the court of aldermen authorized the mayor to meet a committee from the common council to join in the conveyance from the Borough of Norfolk to the lessees of said Town Point lots.

On September 11, 1792, the common council appointed a committee to join with the mayor in conveying said Town Point lots to the several lessees "agreeable to the report made the 24th August last" by said commissioners who had been appointed for the purpose of letting out said land.

Copies of said resolutions and report are filed herewith marked respectively "1," "2," "3," "4," and "5," and prayed to be read as a part hereof.

Pursuant to said proceedings, and as a part of the general plan hereinbefore referred to, on the — day of ——, in the year, 1792, the Borough of Norfolk through its proper officers, in consideration of the yearly rent and covenants therein reserved, mentioned, and contained on the part of the lessee to be paid, done and performed, executed and delivered to said William Williams, his executors, administrators, and assigns, a deed of lease of the said land in the bill mentioned for a period of ninety-nine years, renewable forever. The yearly rent therein reserved was thirty-seven pounds, seven shillings and six pence, which amount for many years has been paid in currency of the United States, the equivalent thereof being reckoned at the sum of $124.58.

Among other covenants in said deed contained is one to the effect that the said Williams, his executors, administrators and assigns would pay, or cause to be paid, to the person or persons authorized to receive the same, the "public and other taxes" which shall accrue on said land.

A copy of said lease is filed herewith, marked exhibit "A," and prayed to be read as a part hereof.

On the 9th and 18th days of September, 1890, after reciting that said lease had by a number of mesne assignments become the prop-

erty of George H. Sargeant, trustee for Elizabeth F. Sar-
23 geant, the wife of William Henry Sargeant, who was then the owner thereof, and that the original term of ninety-nine years of the said lease would expire in the course of a few months, and that said Elizabeth F. Sargeant was entitled to and desired a renewal to her said trustee of the said lease, according to the terms thereof, and had petitioned the councils so to renew said lease, the select and common councils of the City of Norfolk respectively, passed a resolution, as follows:

"Be it therefore resolved by the common and select councils of the City of Norfolk that the presidents of the common and select councils of the City of Norfolk be, and they are, hereby authorized and instructed to execute on behalf of the City of Norfolk as the legal successor of the Borough of Norfolk, a renewal of the said lease for another term of ninety-nine years, renewable forever, according to the terms thereof, to the said George H. Sargeant, trustee, his executors, administrators and assigns, in such form as may be approved by the city attorney and that the said city treasurer be, and he is, hereby authorized and instructed to affix the seal of the City of Norfolk to the said renewal lease when the same shall have been so executed, and to deliver the same to the said Elizabeth F. Sargeant, or her agent or attorney."

A copy of said preamble and resolution is filed herewith marked Exhibit "B," and a copy of said petition of George H. Sargeant, trustee, is filed herewith marked Exhibit "E," and prayed to be read as a part hereof.

On the 19th day of September, 1890, the presidents respectively of the common and select councils of the City of Norfolk in a deed purporting to be on behalf of the City of Norfolk and making certain recitals, among which was a recital in full of the resolutions of the councils hereinabove referred to and marked Exhibit "B," renewed said lease to and in favor of the said George H. Sargeant, trustee for the said Elizabeth F. Sargeant, the wife of the said William Henry Sargeant, for another term of ninety-nine years from the 26th day of August, 1891, and after time renewable for the further term of ninety-nine years, and so on forever. Among other covenants contained in said deed is the following:

"And further that the said George H. Sargeant, trustee, as aforesaid, his successors and assigns, will pay or cause to be paid to the person or persons authorized to receive the same all taxes, State and national, which shall accrue on the said land, and also will keep and perform each and all the other covenants in said original deed contained and by the lessee therein named, his heirs and assigns, to be kept and performed.

24 A copy of said deed is filed herewith marked Exhibit "C" and prayed to be taken as a part hereof.

On the same day, namely the 19th day of September, 1890, the said George H. Sergeant, trustee for Elizabeth F. Sergeant, the wife of William Henry Sargeant, and the said Elizabeth F. Sargeant and William Henry Sargeant, her husband, executed and delivered to William H. White, the plaintiff in this suit, a deed conveying unto

the said William H. White, his heirs and assigns, all their right, title and interest, both at law and in equity in and to the said leasehold property in said deed described, and created and conveyed by the said deed dated the —— day of —— 1792, hereinbefore mentioned, and also the renewal of said lease of said property for another term of ninety-nine years from August 26, 1891, and so on forever, as contained in and created by the said deed from the City of Norfolk to the said George H. Sargeant, trustee, et als., the said William H. White for himself, his heirs and assigns covenanting with his said grantors to pay unto the City of Norfolk the rental reserved by said original lease and renewal deeds, and generally to keep and perform all conditions and covenants in said several deeds contained which by the terms thereof the said George H. Sargeant, trustee for said Elizabeth F. Sargeant, was on his part bound to perform and keep.

A copy of said deed is filed herewith marked Exhibit "D" and prayed to be taken as part hereof.

1. This defendant says that when said renewal lease was executed it was the intention of all the parties thereto that the terms and conditions thereof should be the same as those contained in said original lease, and especially that the covenant or condition contained in said original lease to the effect that the lessee would pay the public and all other taxes which shall accrue on said land should be contained in said renewal lease, and it charges that the said William H. White, the plaintiff in this suit, at the time of his purchase of said lease from the said George H. Sargeant, trustee, et als., had full knowledge of said intention.

And if said covenant or condition is not contained in said renewal lease, this defendant says it was omitted by mutual mistake, and said renewal lease should be corrected to that extent by this court, and for that purpose, if necessary, this defendant asks that its answer be treated as a cross-bill, and that its rights in this regard be fully protected by the court.

2. This defendant admits the statement in paragraph two of said bill that the plaintiff has paid the said yearly rent under said
25 lease as the same has accrued. It is not advised as to whether the State taxes on said land have been paid and it denies that the said plaintiff has otherwise kept and performed all of the provisions and covenants of said lease, which he was required to keep and perform. On the contrary it charges that the said plaintiff has failed to pay the taxes imposed by the City of Norfolk upon the buildings and improvements on said land for some years, and especially for the year 1903.

3. The statements contained in paragraph three of said bill are true.

4. This defendant is not advised as to the statements contained in paragraph four of said bill.

5. This defendant denies that the levy made by W. L. Baker, city collector, for the taxes for the year 1903, imposed as aforesaid, was illegal, as charged in paragraph five of said bill.

And for further answer, and to bring out more clearly this de-

fendant's position, it denies that the only obligation on the part of the plaintiff in the matter of taxes is to pay "taxes, State and national, which shall accrue on said land," and respectfully refers to paragraph one of this answer and to the exhibits filed herewith for a more complete view of the plaintiff's obligation in this regard.

And for further answer, this defendant says that whatever may be the legal construction of the various instruments herein above referred to and filed as exhibits herewith, nevertheless, the buildings and improvements on said land were erected by the said plaintiff and belonged to him and were and are subject to taxation by the City of Norfolk, and further that the taxes imposed by the City of Norfolk upon the buildings and improvements on said land for the year, 1903, and for the other years hereinbefore referred to are just and legal and should be paid by the said plaintiff, just as similar taxes imposed upon property similarly held are paid by other lessees of said Town Point lots.

And now having fully answered plaintiff's bill, this defendant prays that the injunction heretofore granted in this suit be dissolved and that it be hence dismissed with its reasonable costs in this behalf expended, and it will ever pray, &c.

Witness the signatures of the City of Norfolk by J. G. Riddick, its mayor, and the corporate seal of said city attested by H. S. Herman, its city treasurer.

CITY OF NORFOLK,
By JAS. G. RIDDICK, M. D.,
Its Mayor.

26 (Seal of City of Norfolk.)
Attest:
H. S. HERMAN,
City Treasurer.

RICHARD McILWAINE, JR.,
Counsel.

The following is Exhibit "A," filed with the foregoing answer.

This indenture made the —— day of —— in the year of our Lord, one thousand seven hundred and ninety-two between Thomas Newton, Jun, Esquire, mayor of the borough of *the borough of* Norfolk, for and in behalf of the mayor, recorder and aldermen, John Lawrence, & Patrick Parker for and in behalf of the common council of said borough of the one part, and William Williams of the said borough of the other part.

Whereas the common council of the said Borough of Norfolk in common hall assembled, did by their order, bearing date the twenty-third day of April in the year one thousand seven hundred and ninety-two aforesaid appoint Thomas Mathews, James Nimmo, John Smallwood, John Calvert and Phillip Ritter as commissioners for and in behalf of the corporation of said Borough of Norfolk, to treat with and purchase of the Town Point Company the whole of that piece or parcel of land called and known by the name of the

Townpoint land, the greater part of which was then covered with water, and whereas the said commissioners, or a majority of them afterwards in pursuance of the said appointment, did purchase of the trustees of the said Townpoint Company the whole of the said land, at the price of two thousand pounds, as by their deed, for the same bearing date the first day of August will appear.

And whereas the said common council of the Borough of Norfolk in common hall assembled, did by their other order, of the thirty-first day of May in the same year, direct that John Calvert, Phillip Ritter, John Woodside, John Smallwood, John Ingram and James Nimmo or any three should advertise, and let out the said Town Land in lot*s* agreeable to a plan thereof received, by the said common council and now remaining of record, with the clerk of the Borough Court of Norfolk.

And whereas the said last mentioned commissioners agreeable to the above said order (after the same was duly advertised,) did lease out at public auction the whole of the aforesaid lot*s* for ninety-nine years, renewable forever, as by their report made in writing to the said common council on the twenty-fourth day of August
27 last will appear at which auction the said William Williams became the highest bidder, at the price of thirty-seven pounds seven and six pence for lot number nine.

And whereas at a court of aldermen summoned and held the tenth day of September, in the year aforesaid, the said court did authorize and empower the said Thomas Newton, Jr., as mayor for, and in behalf of the mayor, recorder and aldermen to join with a committee of the said common council or any one of their body in conveying the said Town Point Land.

And in consequence thereof, the said common council in common hall assembled, did by their order of the eleventh of September, authorize and empower the said Lawrence and Patrick Parker two of their body for, and in behalf of the said common council to join with the said Thomas Newton Jun. Esq. as mayor of the said Borough of Norfolk, in conveying the said Town point Land to the several Les-ees, agreeable to the report made by the commissioners on the twenty-fourth of August.

Now this indenture witnesseth, That the said Thomas Newton Jun. as mayor, for and in behalf of the mayor, recorder & aldermen and their successors, and the said John Lawrence, Patrick Parker for and in behalf of the said commissioners and their successors. For and in consideration of the yearly rent and covenants hereafter in and by these presents reserved, mentioned and contained on the part and behalf of the said William Williams to be paid done and performed.

They *they* the said Thomas Newton, Jr., John Lawrence and Patrick Parker in behalf of the body corporate of the Borough of Norfolk aforesaid have demised, leased, and to farm let, and by these presents do demise lease and to farm let unto the said Williams the whole of the lot hereinbefore mentioned, distinguished, and known in a plan of said Town Point Land, number nine, and bounded as follows, to-wit: beginning at the intersection of said lott

with the Main & Fayette street run-ing thence southwesterly one hundred & twelve feet, on Fayette street, to the intersection with Kelleys street, thence westerly forty-two feet, nine inches on said street, to the intersection with Lot number 10, thence northerly one hundred and thirteen feet on the line of the lot number ten to the intersection with the Main street, thence easterly fifty-seven feet six inches on Main street to the begin-ing station.

To have and to hold the said lot piece or parcel of land, situate as aforesaid with its appurtenances unto the said William Williams his executor, administrators or assigns from the twenty-sixth day of August last for and during the term of ninety-nine years and after that time, renewable for the further term of ninety-
28 nine years and so on forever, the said William Williams yielding and paying therefor yearly and at the end of every year during the said term to the mayor, recorder, aldermen and common council of the said borough and to their successors, the yearly rent, or sum of thirty-seven pounds, seven shillings & six pence.

And the said William Williams for himself, his executors, administrators or assigns, doth covenant and promise and agree to and with the said Thomas Newton, Jun. John Lawrence and Patrick Parker in behalf of the mayor, recorder, aldermen and common council of the Borough of Norfolk aforesaid that he the said William Williams, his executors, administrators and assigns, shall and will yearly, and at the end of every year, during the aforesaid term of ninety-nine years, pay or cause to be paid to the mayor, recorder aldermen and common council and their successors, the said yearly rent, or sum of thirty-seven pounds seven & six pence.

And further that he, the said Williams, his executors, administrators and assigns will pay, or cause to be paid to the person or persons, authorized to receive the same, the public and other taxes which shall accrue, on the said land, and also will improve or cause to be improved, the said land, in the space of three years from the twenty-sixth of July one thousand seven hundred and ninety-two, in such manner as that the said yearly rent and taxes, shall be sufficiently secured thereby.

And on failure thereof at the expiration of the said three years, from the twenty-sixth day of August one thousand seven hundred and ninety-two, he, the said William Williams, his executors, administrators or assigns, will tender bonds & sufficient security to the mayor, recorder, aldermen, and common council for the farther payment of the said annual rent and taxes until the improvements shall be sufficient to secure the same as aforesaid.

And also that if such bond and security is not given within the space of three months from the expiration of the said three years, that then and in that case it shall and may be lawful for the mayor, aldermen, common council or for any other person or persons duly authorized by them to advertise and lease out the said lot of land again for the best price that can be had.

And that he the said William Williams his executors, administrators or assigns will pay up, and make good, the deficiency of the

rent and taxes (if any) and the deficiency between the first and last prices the said Thomas Newton Jun. John Lawrence and Patrick Parker, promising and agreeing for, and in behalf of the mayor, recorder aldermen, and common council aforesaid that the overplus (if any) between the first and last prices shall be paid to the
29 said Williams, his executors, administrators or assigns. And the said William Williams for himself his heirs executors administrators or assigns doth also agree to and with the said Thomas Newton Jun. John Lawrence & Patrick Parker in behalf of the mayor, recorder, aldermen and common council of the Borough of Norfolk aforesaid, that if the said annual rent, or sum of thirty-seven pounds seven & six pence shall be in arrears with the taxes thereon, (or the annual rent above) for the space of three years, at any one time during the said term of ninety-nine years, that then and in that case, it shall and may be lawful, for the said mayor, recorder, aldermen & common council aforesaid and their successors. And to and for any other person or persons duly authorized by them to advertise and lease out the said lot of land, with all the improvements thereon for the remainder of the said term of ninety-nine years. And that he the said William Williams his executors administrators or assigns will pay & make good the deficiency (if any) between the first and last prices together with arrears of rent, and taxes, to the mayor, recorder aldermen and common council or to any person or persons duly authorized by them to reserve the same. And the said Thomas Newton, Jun. John Lawrence and Patrick Parker for and in behalf of the mayor, recorder, aldermen, and common council of the Borough of Norfolk aforesaid and their successors do promise and agree to and with the said William Williams his executors, administrators or assigns, that if the said improvements shall be made as aforesaid. And the rent and taxes shall be punctually paid, so as not to leave three years rent and taxes in arrears at any one time during the said ninety-nine years that then and after that period the said mayor, recorder, aldermen and common council or their successors shall and will renew the said lease for the farther term of ninety-nine years and so on forever.

In witness whereof, the said Thomas Newton Jun. John Lawrence and Patrick Parker, for and in behalf of the mayor, recorder, alderman and common council of the said Borough of Norfolk have hereunto set their hands and seals the day first herein written.

THOS. NEWTON, JR., *Mayor*, & [SEAL.]
JNO. LAWRENCE, [SEAL.]
PATRICK PARKER, *C. Councilmen*. [SEAL.]

Signed, sealed and delivered in presence of

MAX MAXWELL,
JAS. TAYLOR, JR.,
ROB. TAYLOR,
JAS. DYSON,
THOS. WYLD.

30 NORFOLK BOROUGH:

At a Hustings Court continued and held this 23 day of April, 1793:

An indenture of lease between Thomas Newton Jun. mayor & John Lawrence and Patrick Parker common council of the one part and William Williams of the other part was acknowledged by the said Thomas Newton, Jun. mayor & lodged for further proof. And at another Hustings Court held for the said borough the 27 & 28 day of January, 1794. The said Indentures was acknowledged by the said John Lawrence & Patrick Parker and ordered to be recorded.

Teste:

ALEX. MOSELEY, *C. N. B.*

A copy—Teste:

CORA V. GRIFFIN, *D. C.*

The following is Exhibit "B" filed with the foregoing answer.

Whereas the lease of Town Point Lot No. 9 originally made by the Borough of Norfolk to William Williams, his executors, administrators and assigns, for a term of ninety-nine years from the 26th. day of August, 1792, renewable forever, of record in the clerk's office of the corporation court of the City of Norfolk in Deed Book No. 3, page 27, has by a number of mesne assignments become the property George Sergeant, trustee for Eliza F. Sergeant, the wife of William Henry Sergeant, who is now the owner thereof, and

Whereas the original term of ninety-nine years of the said lease will expire in the course of a few months, and the said Elizabeth F. Sergeant, who contemplated erecting extensive improvements on the said property, is entitled to and desires a renewal to her said trustee of the said lease, according to the terms thereof, and has petitioned the Councils so to renew the said lease, which said petition was referred by the Common Council to the finance committee and has by said committee been returned to this body with the recommendation that the same be granted:

Be it therefore resolved by the Common and Select Councils of the city of Norfolk that the presidents of the Common and Select Councils of the City of Norfolk be and they are hereby authorized and instructed to execute on behalf of the City of Norfolk as the legal successor of the Borough of Norfolk, a renewal of the said lease for another term of ninety-nine years, renewable forever, according to the terms thereof, to the said George H. Sergeant, trustee for Elizabeth F. Sergeant, his executors, administrators, and
31 assigns, in such form as may be approved by the city attorney, and that the city treasurer be and is hereby authorized and instructed to affix the seal of the City of Norfolk to the said renewal lease when the same shall have been so executed, and to

deliver the same to the said Elizabeth F. Sergeant, or her agent or attorney.

Adopted by the Select Council Sept. 9th, 1890.

Adopted by the Common Council Sept. 18th, 1890.

Teste:

H. S. HERMAN,
City Treasurer.

The following is Exhibit "C" filed with the foregoing answer.

Whereas, Thomas Newton, junior, esquire, mayor of the Borough of Norfolk for and in behalf of the mayor, recorder and aldermen, John Lawrence and Patrick Parker, for and in behalf of the Common Council of said Borough, by deed dated the — day of —, 1792, and duly recorded in the clerk's office of the Corporation Court of the City of Norfolk, in Deed Book No. 3, page 27, did lease unto William Williams the following property, to-wit: The whole of the lot therein mentioned distinguished and known on a plan of the Town Point Land, by number nine and bounded as follows, to-wit: Beginning at the intersection of said lot with the Main and Fayette Streets, running thence southwesterly one hundred and twelve feet on Fayette Street to the intersection with Kelly's Street, then westerly forty-two feet, nine inches on said street to the intersection with Lot No. 10, thence northerly one hundred and thirteen feet on the line of the Lot No. 10, to the intersection with Main Street, thence easterly fifty-seven feet, six inches on Main Street to the beginning station," from the 26th day of August, 1792, for and during the term of ninety-nine years, and after that term, renewable for the farther term of ninety-nine years, and so on forever, the said William Williams yielding and, paying therefor, yearly, at the end of every year during the said term to the said Borough of Norfolk, and to its successors, the yearly rent or sum of thirty-seven pounds, seven shillings and six pence, and also the public taxes which should accrue on the said property and performing the other covenants in said deed contained; and

Whereas the said lease by a number of mesne assignments became the property of Phœbe L. Williams, who by her last will and testament, a duly certified copy of which was admitted to record
32 by the Corporation Court of the City of Norfolk on the 18th day of September, 1890, bequeathed the said leasehold to George H. Sargent, trustee, for her daughter Elizabeth F. Sargent wife of Wm. Henry Sargent, who is now the owner thereof; and

Whereas the said owner desiring to have said lease renewed for another term of ninety-nine years and so on forever according to the provisions to that end contained in said deed, did petition the Select and Common Councils of the City of Norfolk, (said city being the legal successor of the Borough of Norfolk) so to renew the said lease; and

Whereas the said Select Council of said city on the 9th day of September, 1890, and the said Common Council of said city on the 18th day of September, 1890, did adopt the following resolution, to-wit:

"Whereas the lease of Town Point Lot No. 9, originally made by the Borough of Norfolk to William Williams, his executors, administrators and assigns, for a term of ninety-nine years, from the 26th day of August, 1792, renewable forever, of record in the clerk's office of the Corporation Court of the City of Norfolk in Deed Book No. 3, page 27, has by a number of mesne assignments become the property of George G. Sergeant, trustee for Elizabeth F. Sargeant, the wife of William Henry Sergeant, who is now the owner thereof, and

Whereas the original term of ninety-nine years of the said lease will expire in the course of a few months, and the said Elizabeth F. Sergeant, who contemplates erecting extensive improvements on the said property, is entitled to and desires a renewal to her said trustee of the said lease, according to the terms thereof, and has petitioned the Councils so to renew the said lease, which said petition was referred by the Common Council to the finance committee and has by said committee been returned to this body with the recommendation that the same be granted.

Be it therefore resolved by the Common and Select Councils of the City of Norfolk that the presidents of the Common and Select Councils of the City of Norfolk, be and they are hereby authorized and instructed to execute on behalf of the City of Norfolk, as the legal successor of the Borough of Norfolk, a renewal of the said lease for another term of ninety-nine years renewable forever, according to the terms thereof, to the said George H. Sergeant, trustee for Elizabeth F. Sergeant, his executors, administrators and assigns, in such form as may be approved by the city attorney, and that the city treasurer be and is hereby authorized and instructed to affix the seal of the City of Norfolk, to the said renewal lease, when the same shall have been so executed, and to deliver the same to the said Elizabeth F. Sergeant, or her agent or attorney."

33 Now, therefore, this deed, made this nineteenth day of September in the year of our Lord one thousand eight hundred and ninety, between the City of Norfolk, and as such the legal successor to the Borough of Norfolk, acting by H. Hodges the president of the Common Council of said city, and S. Marx, president of the Select Council of said city, of the one part and George H. Sargeant, trustee for Elizabeth F. Sargeant, the wife of Wm. Henry Sargeant, of the other part.

Witnesseth that for and in consideration of the premises and of the covenants of renewal contained in the said deed of lease from the Borough of Norfolk to William Williams, and of the rent to be paid as hereinafter mentioned, the said City of Norfolk, acting by the said president of the Common and Select Councils of said city, doth hereby renew the said lease of said property hereinbefore described, to and in favor of the said George H. Sargeant, trustee for Elizabeth F. Sargeant, the wife of Wm. Henry Sargeant, for another term of ninety-nine years from the 26th day of August, 1891, and after that time renewable for the farther term of ninety-nine years, and so on forever, the said George H. Sargeant, trustee as aforesaid, and his assigns, yielding and paying for said property, yearly, at

the end of every year during the said term to the said City of Norfolk, the yearly rent or sum of one hundred and twenty-four dollars and fifty-eight cents ($124.58) that being the sum which the said city years ago fixed upon and accepted as the equivalent of the thirty-seven pounds, seven shillings and six pence in said original deed of release reserved.

And the said George H. Sargeant, trustee as aforesaid, for himself, his successors and assigns, doth covenant, promise and agree to and with the said City of Norfolk the legal successor of the Borough of Norfolk as aforesaid, that he the said trustee, his successors and assigns, shall and will yearly and at the end of every year during the aforesaid term of ninety-nine years, pay or cause to be paid to the City of Norfolk the said yearly rent of one hundred and twenty-four dollars and fifty-eight cents.

And further that the said George H. Sargeant, trustee as aforesaid, his successors and assigns, will pay or cause to be paid to the person or persons authorized to receive the same, all taxes, State and National, which shall accrue on the said land, and also will keep and perform each and all the other covenants in said original deed contained and by the lessee therein named, his heirs and assigns, to be kept and performed.

34 And the said City of Norfolk acting by the presidents of its Select and Common Councils, as aforesaid, doth promise and agree to and with the said George H. Sargeant, trustee as aforesaid, his successors and assigns, that if the improvements shall be made and maintained as required by the terms of said original deed, and the said rent and taxes shall be promptly paid so as not to leave three years' rent and taxes in arrears at any one time during the said additional term of ninety-nine years, that then and after that period, the said City of Norfolk, or its successors, shall and will renew this lease for the further term of ninety-nine years and so on forever.

In Witness Whereof the said H. Hodges, President of the Common Council, and S. Marx, President of the Select Council, in behalf of the said City of Norfolk, have hereunto set their signatures, and W. W. Hunter, the City Treasurer of the said City has hereunto affixed the seal of said City of Norfolk.

S. MARX,
Pres. S. Council.

[SEAL.]

H. HODGES,
President Common Council.

CORPORATION OF THE CITY OF NORFOLK, *To wit:*

I, J. W. Wilcox, a notary public for the corporation aforesaid in the State of Virginia, do certify that H. Hodges, president of the Common Council of the City of Norfolk, and S. Marx, president of the Select Council of said city, whose names are signed to the writing above, bearing date on the 19th day of September, in the year eighteen hundred and ninety, have acknowledged the same before me in my corporation aforesaid as the act and deed of the City of Norfolk, and W. W. Hunter, treasurer of said city, has acknowledged before

me in my corporation aforesaid that the above seal is the seal of the City of Norfolk, and that the same was affixed to the said writing by him.

Given under my -and, this 25th day of September, in the year 1890.

J. W. WILCOX,
Notary Public.

To S. Marx, Pres'd't of Select Council, and H. Hodges, President of Common Councils.

GENTLEMEN: The above is the lease recommended by the Councils to be drawn in favor of George H. Sergeant Trustee for Elizabeth F. Sergeant, and I approve the same and ask that it be executed by you gentlemen in your official capacity.

Very truly,

JAMES F. DUNCAN,
City Attorney.

Sep. 23/90.

35 VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk, on the 1st Day of October, 1890.

This deed was received, and, upon the certificate of acknowledgment annexed, admitted to record.

Teste:

W. A. YOUNG, *Clerk.*

A copy—Teste:

CORA V. GRIFFIN, *D. C.*

The following is Exhibit "D," filed with the foregoing answer:

This deed made this nineteenth day of September, in the year of our Lord, eighteen hundred and ninety between George H. Sargeant, Trustee for Elizabeth F. Sargeant, the wife of William Henry Sargeant, of the City of Baltimore, Maryland, and the said Elizabeth F. Sargeant and William Henry Sargeant her husband, of the County of Princess Anne, parties of the first part and William H. White, of the City of Norfolk, Virginia, of the second part.

Whereas the lease of Town Point Lot number nine (9) originally made by the Borough of Norfolk to William Williams for a term of ninety-nine years from the 26th day of August, 1792, renewable forever, and of record in the Clerk's Office of the Corporation Court of the City of Norfolk, in Deed Book No. 3, page 27, has by a number of mesne assignments and by the will of Phoebe S. Williams, which will is of record in the Clerk's Office of the Corporation Court of Norfolk City, become the property of the said George H. Sargeant, Trustee for the said Elizabeth F. Sargeant, the wife of William Henry Sargeant, and

Whereas, the City of Norfolk as the legal successor of the said Borough of Norfolk, has by its deed of even date and to be recorded

herewith, renewed the said lease for another term of ninety nine years from the 26th. day of August, 1891, renewable forever, in which said deeds the property thereby leased is described as follows:

"The whole of the lot distinguished and known on a plan of the Town Point Land as number nine (9) and bounded as follows:

Beginning at the intersection of said lot with the Main and Fayette Streets running thence southwesterly One hundred and twelve feet on Fayette Street to the intersection with Kelly's Street, thence westerly forty two feet, nine inches on said street to the intersection with Lot No. 10, thence northerly one hundred and thirteen feet on the line of the lot No. 10, to the intersection with the Main Street, thence easterly *fixty* seven feet, six inches to the beginning station."

Now therefore, This Deed Witnesseth that the said parties of the first part, for and in consideration of the sum of Twenty
36 one thousand dollars and the covenants hereinafter contained do grant, bargain and sell the said George H. Sargeant Trustee, with special, and the other grantors with general warranty unto the said William H. White and unto his heirs and assigns, all their right, title and interest, both at law and in equity in and to the said Leasehold property hereinbefore described and created and conveyed by the said deed recorded as aforesaid in Deed Book No. 3, page 27, and also the renewal of said lease of said property for another term of ninety nine years from August 26th. 1891, and so on forever, as contained in and created by the said deed of the City of Norfolk, to the parties of the first part of even date herewith. It being the intention of the parties of the first part to convey and they do hereby convey, the said George H. Sargeant Trustee with special and the other grantors with general warranty, unto the said William H. White, as well their interest in the unexpired term of years to the said property known as lot number nine (9) situated on the corner of Main and Fayette Streets, in the City of Norfolk aforesaid, under the said original deed of lease, as their interest in the said term of ninety nine years renewable forever under the said deed of even date herewith renewing said original lease.

The said William H. White for himself, his heirs and assigns, in consideration of the premises doth hereby covenant with the said parties of the first part to pay unto the City of Norfolk the rental reserved by said original and renewal deeds, and generally to keep and perform all the conditions and covenants in said several deeds contained which by the terms thereof the said parties of the first part were on their part bound to perform and keep.

In Witness Whereof the said parties have hereunto set their hands and affixed their seals the day and year first herein above written.

GEORGE H. DARGEANT, *Trustee.* [SEAL.]
ELIZABETH F. SARGEANT. [SEAL.]
WM. HENRY SARGEANT. [SEAL.]

STATE OF MARYLAND,
City of Baltimore, To wit:

I, Wm. H. Jones, a notary public for the city and State aforesaid, do certify that George H. Sargeant, trustee, whose name is signed to the foregoing deed bearing date on the 19th day of September, 1890, has acknowledged the same before me in my city aforesaid.

Given under my hand and official seal, this 26th day of September, 1890.

37 The words "the said George H. Sargeant with special and the other grantors" were interlined on the 2nd page and 5th line after the word "sell" before the execution of this deed; and the same words were also interlined on the 2nd page, 14th line after the word "convey," before the execution hereof.

WM. H. JONES,
Notary Public.

[NOTARIAL SEAL.]

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, Thomas H. Wilcox, a notary public for the city and State aforesaid, do certify that Elizabeth F. Sargeant, the wife of Wm. Henry Sargeant, and the said Wm. Henry Sargeant, whose names are signed to the foregoing deed bearing date on the 19th day of September, 1890, have acknowledged the same before me in my city aforesaid.

Given under my hand, this 30th day of September, 1890.

THOMAS H. WILCOX,
Notary Public.

VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk.

On the 1st day of October, 1890, this deed was received, and, upon the certificates and acknowledgment thereto annexed, admitted to record.

Teste:

W. A. YOUNG, *Clerk,*
By LAW L. WARING, *D. C.*

A copy—Teste:

CORA V. GRIFFIN, *D. C.*

The following is Exhibit "E," filed with the foregoing answer.

To the Honorable Select and Common Councils of the City of Norfolk:

I respectfully petition your honorable bodies to renew the lease of Town Point lot number nine (9) originally made by the Borough of Norfolk to William Williams, his executors, administrators and assigns, for a term of ninety-nine years from the 26th day of August,

1792, renewable forever. Which said lease is found of record in the clerk's office of the Corporation Court of the City of Norfolk in Deed Book No. 3, page 27, and which by a number of mesne assignments has become the property of George H. Sargeant, trustee for Elizabeth F. Sargeant, the wife of William Henry Sargeant, and who is now the owner thereof.

While this lease does not expire for some months yet, I
38 am in the midst of negotiations which make it indispensable to the interests of Mrs. Sargeant that the said lease should be renewed for ninety-nine years, renewable forever, according to the terms thereof, now rather than on the immediate day of the expiration of the current term of the original lease.

In order that your honorable bodies might be fully informed of the propriety of granting this request, I have taken the precaution to submit a copy of the said original lease to Jas. F. Duncan, the city attorney, who will, in due time, advise your bodies of his judgment and opinion in the matter.

Respectfully submitted,

(Sgd.) GEORGE H. SARGEANT,
Trustee for Elizabeth F. Sargeant,
By BORLAND & WILCOX,
His Attorneys.

The following is Exhibit No. 1, filed with the foregoing answer:

Extract from the Minutes of the Common Council of the City of Norfolk.

MAY 31ST, 1792.

The Committee appointed to superintend the surveying and laying off of the Town Point Land in lots and streets, produced a plan, ordered that the same be postponed for further consideration.

On a Motion. Resolved that Mr. John Calvert, Mr. Smallwood, Mr. Ritter, Mr. Woodside, Mr. Nimmo and Mr. Ingram, or any three of them be commissioned to advertise the letting out of the Town Point Land on lease for ninety-nine years, renewable forever, on the Fourth Tuesday in July next.

Teste:

H. S. HERMON,
City Treasurer.

The following is Exhibit No. 2, filed with the foregoing answer:

Extract from the Minutes of the Common Council of the City of Norfolk.

JULY 16TH, 1792.

The Hall took into consideration the plan of the Town Point Land reported by the Committee the Last Hall, and also the plans now produced, drawn by Mr. John Calvert and Mr. Campbell. Resolved, and it is the opinion of this Hall that the plans drawn by

Mr. Campbell be adopted, and that the Commissioners lease
39 out the said land agreeable to said plan on such terms, and in such manner as they may think most conducive to the interest of the Corporation.

Teste: H. S. HERMON,
City Treasurer.

The following is Exhibit No. 3, filed with the foregoing answer:

Extracts from the Minutes of the Common Council of the City of Norfolk.

AUGUST 24TH, 1792.

The Committee ap-ointed to advertise and let out on lease the Town Point Land reported the same, which was read, approved of and ordered to be recorded, and is as follows, to-wit: "The Committee appointed to advertise and let out on lease the Town Point Land pursuant to an order of the Hall bearing date the 31st day of May last, have according to order proceeded to let the same and report as follows: Your Committee supposing that it would tend to the benefit and advantage of the Corporation though- proper to delay the letting the land out until the design could be generally promulgated, they therefore forwarded advertisements of their design to Petersburg, Richmond, Baltimore, Philadelphia, New York, Edenton, and Charleston, and on the 26th. day of July, last, proceeded to let the land out on lease as follows:

Conditions fixed on by the Commissioners for, letting out the Town Point Land lots agreeable to a plan thereof drawn by Donald Campbell, Esquire, received and approved of by the Common Council of the Borough of Norfolk.

1. The several lots contained in said plan are to be leased out upon ground rent to be paid annually for the term of ninety-nine years, renewable forever, if the conditions expressed in the several leases are performed.

2. Each lot is to be improved within three years from 26th. of July, 1792.

3. Bond and approved security is to be given within two months from the said 26th of July 1792, for the payment of the ground rent annually, until the improvements are sufficient to secure the same.

4. No lease will be executed until such bond and security is given.

5. If the rent should be in arrears for the space of three years at any one time, the land and improvements thereon are to be sold for the remainder of the lease to satisfy the said arrears of rent, and the expenses of sale, and the overplus of the money, if any, will be paid to the first lessee.

40 6. If the lessees do not tender to the Commissioners, or a majority of them, bond and approved security within two months from the said 26 July to secure the rent as aforesaid, and apply for leases, the lands shall again be set up to the highest bidder and the first lessees answerable for the deficiency (if any) between the first and last prices.

7. The lessees shall be at the expense of the leases and bonds.
8. The ground rent is to commence from the 26th. day of August
9. The public and other taxes accruing or to accrue on the several lots after this day are to be paid by the lessees.

At which sale, the hereafter named persons became the highest bidder for the lots agreeable to the number and price affixed against their names.

Thoas. Willock, Lot 1, 100 ft. front to channel, at 6/8 pr. ft.
John Warren, Lot 2, 115 ft. on Lee St., at 1/8 pr. ft.
Nicholas Boss, Lot 3, 46 ft. 8″ on Fayette St., at 12/3 pr. ft.
Nicholas Boss, Lot 4, 130 ft. on Water St., at 5/9 pr. ft.
James Weir, Lot 5, 70 ft. on Water Street, at 10/3 pr. ft.
John Shellman, Lot 6, 69 ft. on Water Street, at 3/9 pr. ft.
Geo. Murphy, Lot 7, 81 ft. on Kelly Street, at 7/6 pr. ft.
James Hunter, Lot 8, 69 ft. on Kelly Street, at 2/3 pr. ft.
Wm. Williams, Lot 9, 57 ft. 6″ on Main Street, at 13/0 pr. ft.
Richard E. Lee, Lot 10, 60 ft. on Main Street, at 2/3 pr. ft.
Richard E. Lee, Lot 11, 60 ft. on Main Street, at 2/3 pr. ft.
Richard E. Lee, Lot 12, 116 ft. on the water front to channel, at 11/6 pr. ft.
Richard E. Lee, Lot 13, 100 ft. on Lee Street, at 3/0 pr. ft.
Edward Starke, Lot 14, 45 ft. on Washington St., at 6/9 pr. ft.
James Paul, Lot 15, 45 ft. on Washington St., at 7/0 pr. ft.
Baylor Hill, Lot 16, 50 ft. on Washington St., at 2/9 pr. ft.
Geo. Kelly, Lot 17, 50 ft. on Washington St., at 2/5 pr. ft.
Phineas Dana, Lot 18, 115 ft. on Washington St., at 0/7 pr. ft.
Maynor Dyson, Lot 19, 50 ft. on Main St., at 1/1 pr. ft.
John Warren, Lot 20, 50 ft. on Main St., at 0/6 pr. ft.
Richard E. Lee, Lot 21, 50 ft. on Main St., at 0/7 pr. ft.
Edward Archer, Lot 22, 50 ft. on Parker St., at 0/3 pr. ft.
Fred'ick Williams, Lot 23, 50 ft. on Parker St., at 0/4 pr. ft.
Wm. Niveson, Lot 24, 78 ft. on Parker St., at 0/5 pr. ft.
Wm. Graves, Lot 25, 100 ft. on Water St., at 1/5 pr. ft.
James Boyce, Lot 26, 100 ft. on Kelly St., at 0/9 pr. ft.
David Patterson, Lot 27, 115 ft. on front to channel, at 6/8 pr. ft.
John S. Calvert, Lot 28, 45 ft. on Mathews St., at 4/0 pr. ft.
41 Archer & Capron, Lot 28, 114 ft. on front to channel at 2/1 pr. ft.
Donald Campbell, Lot 30, 50 ft. on Mathews St., at 2/6 pr. ft.
Fred-ick Williams, Lot 31, 50 ft. on Mathews St., at 2/0 pr. ft.
Wm. Niveson, Lot 32, 50 ft. on Mathews St., at 1/6 pr. ft.
Wm. Stokes, Lot 33, 72 ft. on Mathews St., at 0/10 pr. ft.
David Patterson, Lot 34, 50 ft. on Parker St., at 0/4 pr. ft.

JOHN CALVERT,
JOHN SMALLWOOD,
PHILLIP RITTER,
JOHN WOODSIDE,
JOHN INGRAM.

Norfolk, August 24, 1792.

Teste:

H. S. HERMON,
City Treasurer.

The following is Exhibit No. 4, filed with the foregoing answer:

Extract from the Minutes of the Common Council of the City of Norfolk.

SEPTEMBER 11th, 1792.

The President layed before the Hall a letter from the Mayor with the resolutions of the Court of Aldermen of the 10th, of this instant respecting the Town Point Lands, wherein the Mayor, Recorder and Aldermen have authorized and empowered the Mayor on their part to meet a Committee from the Common Council or any one of that body to join in the conveyance from this Corporation to the lessees of the Town Point Land: Resolved therefore, that Mr. Patrick Parker, and Mr. John Lawrence be a committee on the part of the Common Council to join with the Mayor in conveying the Town Point Land to the several lessees agreeable to the report made the 24th. of August last by John Calvert, John Smallwood, Phillip Ritter, John Woodside and John Ingram, who were of the committee appointed to let out the said Town Point Land.

Teste: H. S. HERMON,
City Treasurer.

The following is Exhibit No. 5, filed with the foregoing answer:

Extract from the Minutes of the Court of Aldermen Held the 10th Day of September, 1792.

The Court took into consideration sundry resolutions of
42 Common Hall laid before them on Friday last, and the proceedings of the Hall respecting the purchase and disposal of the Town Point Land, came to the following resolution: to-wit: Resolved that the Mayor, Recorder and Aldermen are satisfied with the apology made them by the Common Council and therefore resolved that the Mayor be appointed in behalf of the Mayor, Recorder and Aldermen to meet a committee from the Common Council or any one of their body, to join in the conveyance from this corporation to the lessees of the Town Point Land.

Teste: H. S. HERMAN,
City Treasurer.

And at another day, to-wit: in the Circuit Court aforesaid, on the 20th day of June, 1906,

By consent of counsel for all parties, it is ordered that this cause be made a vacation cause to be submitted to the judge of this court for such decision and decree, or order, in vacation, as might be made in term.

The following is a stipulation of counsel filed in this cause:

VIRGINIA:

In the Circuit Court of the City of Norfolk.

WM. H. WHITE
v.
W. L. BAKER, City Collector, and THE CITY OF NORFOLK.

It is agreed between Walter H. Taylor, attorney for the plaintiff and N. T. Green and James F. Duncan, attorneys for the defendants, that the amended bill filed by the plaintiff in this cause shall be treated as having been filed as of the 17th day of December, 1906, and shall be as binding in all respects as though the same had been regularly filed by leave of court.

WALTER H. TAYLOR,
Attorney for Plaintiff.
NATH'L T. GREEN,
JAMES F. DUNCAN,
Attorneys for Defendants.

The following is the amended bill, filed herein in pursuance of the foregoing stipulation of counsel.

43 In the Circuit Court of the City of Norfolk.

WILLIAM H. WHITE
v.
W. L. BAKER, City Collector, and THE CITY OF NORFOLK.

Amended Bill.

To the Honorable R. R. Prentis, Judge of the said Court:

Your orator, William H. White, in this his amended bill, respectfully shows unto your honor the following case.

1. In the year 1761 the General Assembly of Virginia passed an act which, (after reciting that a certain piece of land in the Borough of Norfolk, whereon a public warehouse lately stood, commonly called the "Fort Land," is *saily* wasting away by the washing of the river and the justices of the county not having power to appropriate money for that purpose, and there not being sufficient in the treasury of the said Borough to justify the expense of securing the same and building a wharf and warehouses thereon which are very necessary and convenient for shipping and would be a great benefit to the County of Norfolk and the said Borough) granted the said property to persons therein named, who became popu-arly known as the Town Point Company. In the year 1792, the Borough of Norfolk purchased all of the said property then known as "Town Point" or the "Fort Lands" for the sum of 2000 pounds. The borough, thus having become the owner of the property, proceeded immediately, as a private individual, to lease it out in various lots, under forms of

lease used in those days, for ninety-nine years, renewable forever. The lots were leased at public auction in August, 1792, and the rental derived therefrom by this leasing and by the leasing of some of the lots which the original lessees failed to take a few years afterwards, amounted to 546 pounds, 17s 6d annually, or more than 27% per year on the purchase price of 2000 pounds. This percentage represented a net profit, as the lessee had to pay the State taxes. Certified copies of the reports of the committees who leased the lots are herewith filed marked "Exhibit A," as a part of this bill.

2. Among the lots on Town Point so leased was lot No. 9, which was leased to one William Williams, and by the terms of said lease the said William Williams covenanted to pay during said term of ninety-nine years the annual rental of 37 pounds, 7s. 6d., and further to pay or cause to be paid to the person or persons authorized to receive the same, the public and other taxes which should accrue on the said land, and further to improve or cause to be improved the said land in the space of three years, in such manner that the said annual rent and taxes should be sufficiently secured thereby, a certified copy of which deed is herewith filed, marked "Exhibit B," as a part of this bill.

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3. At the time that said lease was made namely, in 1792, not only did the County of Norfolk and the Borough of Norfolk have no power to tax land, but taxation of land by a county, city or borough in the State of Virginia, was absolutely unknown. There had been, previously to this time, State taxation upon land but at the time of said lease there was no State taxation on land. Taxation by counties, cities and boroughs consisted alone of title or pool taxation. The reference, therefore, in said lease to public or other taxes on the land could have application only to taxes or local assessments imposed by the State or National Government.

4. The end of the original ninety-nine year term of the said lease was the 26th day of August, 1891, and on the 19th day of September, 1890, the City of Norfolk, as the legal successor of the Borough of Norfolk, acting by the president of its common council and the president of its select council, in accordance with a resolution of the said councils, passed in September, 1890, executed and delivered to George H. Sargeant, trustee of Elizabeth F. Sargeant, the wife of William Henry Sargeant, *the wife of William Henry Sargeant*, who had by mesne conveyances become the owner of said lease, a renewal lease in form approved by the city attorney for a further term of ninety-nine years, beginning with the 26th of August, 1891, the said original lease having provided that a further lease for another term of ninety-nine years and so on forever, would be granted by the said Borough of Norfolk upon the petition of the said William Williams or his assigns. By the said renewal lease, the said George H. Sargeant, trustee, as aforesaid, covenanted to pay the annual rental of $124.58, that being the sum which the city years ago fixed upon and accepted as the equivalent of 37 pounds, 7s. 6d. reserved in the original lease; and further covenanted to pay or cause to be paid to the person or persons authorized to receive the same, all taxes, State and National, which should accrue on the said land. A certified copy of

said lease is herewith filed marked "Exhibit C," as a part of this bill.

At no time from 1792, when the original lease was made, down to the year, 1896, did the State of Virginia tax any property belonging to a city, and therefore, at no time during the said period were any State taxes assessed upon this property. In the year 1896, by an act approved January 28th, it was provided that buildings or improvements of any real estate belonging to any county, city or town which are leased for profit, should not be exempt from taxation in the manner that other real estate belonging to a county, city or town is exempt, and from then on, the said lot No. 9, leased originally to William Williams and renewed to George H. Sargeant, trustee, has been assessed with State taxes. At the time said renewal lease was executed no attempt had been made by the City of Norfolk to assess the said land or buildings thereon.

5. On the 19th day of September, 1890, the said George H. Sargeant, trustee, and the said Elizabeth F. Sargeant, conveyed said lease for said lot No. 9 to your orator William H. White. Your orator immediately proceeded to construct upon said lot No. 9 the present buildings thereon.

Your orator was induced to purchase said land to pay therefor largely in excess of what he otherwise would have done and made said improvements by reason of the fact that neither the land nor the buildings would be liable to city taxation.

6. Nevertheless, in the year 1903, the City of Norfolk assessed the buildings constructed by your orator on said land, for taxation in the name of your orator although it did not assess the land for taxation upon which the buildings were erected, and W. L. Baker, city collector of the City of Norfolk, did on the 11th day of December, 1905, levy upon the furniture of your orator at his office in the Citizen's Bank Building, in the City of Norfolk, for the city taxes on said building for the year, 1903, the said furniture consisting of the following articles: one oak desk, one oak filing case, five office chairs, one office sofa, and the said W. L. Baker threatened to advertise and sell the said furniture for the said taxes, which said taxes the City of Norfolk alleged to be $255.00 with five per cent. penalty and six per cent. interest on the said $255.00, from February 1, 1904, until paid. Your orator alleges that he has paid the annual rent which has accrued under said renewal lease promptly to the City of Norfolk as the same has accrued, and that he has performed each and every other covenant contained in said renewal lease which by said lease he is required to perform; and he further alleges that all the owners of the said lease from the time the original lease was made to said William Williams down to the present time have paid the said rental as required and performed all the other terms of said original and said renewal lease as required by the said leases respectively, and your orator alleges in particular that the said William Williams constructed upon said land the said buildings as he was required by the lease so to do, within the three years, as specified in said original lease, and that the said

buildings above mentioned constructed by your orator, were constructed in place of said original building constructed by said William Williams on said land, and that your orator tore
46 down the original buildings in order to place the buildings constructed by him as aforesaid.

7. Your orator further alleges that said building is a part of the freehold, and if said lease should terminate, would belong to the City of Norfolk, and could not be removed by your orator from the land; that, therefore, the said building is as much the property of the City of Norfolk as the said land, and could no more be taxed by the City of Norfolk in the year 1903, than could the land, the fee of which is in the City of Norfolk.

8. Your orator further alleges that from time to time prior to 1903, the City of Norfolk has attempted to assess your orator with taxes on the buildings on said lot nine, but in every instance upon the application of your orator to the Corporation Court under the statute in such cases made and provided, your orator has been released from the payment of such taxes. In particular your orator calls the court's attention to the orders entered by the Corporation Court of the City of Norfolk, releasing the said property from city taxation, on the 23rd day of February, 1894, and on the 31st day of October, 1898 certified copies of which are herewith filed, marked "Exhibit D and E" as a part of this bill; and further to an order entered by the Corporation Court on the 30th day of July, 1895, a certified copy of which is herewith filed marked "Exhibit F," as a part of this bill, removing the said property from the assessor's book for either city or State taxation.

9. Your orator further alleges that the attempt of the City of Norfolk to levy a tax upon the said buildings is in violation of the contract between your orator and the City of Norfolk, and that if the city is allowed to do so and your orator is required to pay the same, it will be an impairment of the obligation of a contract evidenced by the said original and renewal leases and contrary to the Constitution of the United States.

10. Your orator further alleges that even if the said building is subject to said taxation, such taxation may be assessed against the City of Norfolk, the owner of said land and building, and not being so assessed but being assessed in the name of your orator is null and void.

11. Your orator further alleges that under the statute law, the City of Norfolk can tax realty only on the assessment made by the State and that the assessment made by the State is on said lot Number Nine with the improvements thereon, the said assessment being as a whole and not divisible, and that therefore a tax by the city on the building alone is null and void.

Your orator therefore prays that the City of Norfolk, the said W. L. Baker, ex-city collector of the City of Norfolk, and
47 E. J. Gorman, present city collector, may be made parties defendant to this bill and be required to answer the same, but an answer under oath is waived, that the temporary injunction granted by this court against the said W. L. Baker and the City

of Norfolk advertising or selling your orator's furniture levied on as aforesaid, be made permanent, and that the tax levied by the City of Norfolk on the buildings upon said land be declared null and void and that your orator may have such other, further and general relief as the nature of his case may require or to equity shall seem meet.

And your orator will ever pray, etc.

WM. H. WHITE.

Subscribed and sworn to before me this — day of December, 1906. My commission expires on the — day of ——, 19–.

——— ———,
Notary Public.

The following is Exhibit "A" filed with the foregoing amended bill.

NORFOLK BOROUGH:

At a Common Hall held the 24th day of August, 1792.

The Committee appointed to advertise and let out on lease the Town Point Land reported the same, which was read, approved of and ordered to be recorded and is as follows, to-wit:

The Committee appointed to advertise and let out on lease the Town Point Land pursuant to an order of the Hall bearing date the 31st day of May last have according to order proceeded to let the same and report as follows: Your Committee supposing that it would tend to the benefit and advantage of the corporation thought proper to delay the letting the land out until the design could be generally promulgated; they therefore forwarded advertisements of their design to Petersburg, Richmond, Baltimore, Philadelphia, New York, Edenton and Charleston, and on the 26th day of July last proceeded to let the land on lease as follows:

Conditions fixed by the Commissioners for letting out the Town Point Lots agreeable to a plan thereof drawn by Donald Campbell, Esquire, received and approved by the Common Council of the Borough of Norfolk.

1st. The several lots contained in said plan are to be leased out upon ground rent to be paid annually for the term of 99 years renewable forever, if the conditions expressed in the several leases are performed.

2nd. Each lot is to be improved within 3 years from 26th July, 1792.

48 3d. Bond and approved security is to be given within two months from the 26th July, 1792, for payment of the ground rent annually until the improvements are sufficient to secure the same.

4th. No lease will be executed until such bond and security are given.

5th. If the rent should be in arrears for the space of three years

at any one time the land and improvements thereon are to be sold for the remainder of the lease to satisfy the said arrears of rent and the expense of sale, and the over-plus, if any, will be paid to the said lessees.

6th. If the lessees do not tender to the Commissioners, or a majority of them bond and approved security within two months from the said 26th July, 1792, to secure the rent aforesaid, and apply for leases, the lands shall again be set up to the highest bidder and the first lessees answerable for the deficiency (if any) between the first and last prices.

7th. The Lessees shall be at the expense of the *Lesses* and bonds.

8. The ground rent is to commence from the 20th August, 1792.

9th. The public and other taxes accruing or to accrue, on the several lots after this day are to be paid by the lessees.

At which sale the hereinafter named persons became the highest bidder- for the lots agreeable to the number and prices affixed against their names:

Thomas Willock, for lot No. 1, 100 ft. front to the channel at 6/3 p. ft.

John Warren for lot No. 2, 115 ft. on Lees St. 1/8 p. ft.

Nicholas Boss for lot No. 3, 116 ft. 6 inches Fayette Street at 12/3 p. ft.

Nicholas Boss for lot No. 4, 130 ft. Water Street at 5/9 p. ft.

James Weir for lot No. 5, 70 ft. Water Street at 10/3 p. ft.

John Shellhouse for lot No. 6, 69 ft. Water Street at 3/9 p. ft.

George Murphy for lot No. 7, 81 ft. Kelly Street at 7/6 p. ft.

James Hunter for lot No. 8, 69 ft. Kelly Street at 2/3 p. ft.

William Williams for lot No. 9, 57 ft. 6 in. on Main St. 2/13 p. ft.

Richard E. Lee for lot No. 10, 60 ft. on Main Street 2/3 p. ft.

Ditto Ditto for lot No. 11, 60 ft. on Main Street 2/0 p. ft.

Ditto Ditto for lot No. 12, 116 ft. on water front to the channel 11/6 p. ft.

Ditto Ditto for lot No. 13, 100 ft. on Lees Street 3/0 p. ft.

Edwin Starke for lot No. 14, 45 ft. on Washington St. 6/0 p. ft.

James Paul for lot No. 15, 45 ft. on Washington St. 7/0 p. ft.

Baylor Hill for lot No. 16, 50 ft. on Washington St. 2/9 p. ft.

George Kelly for lot No. 17, 50 ft. on Washington St. 2/5 p. ft.

49 Phineas Dana for lot No. 18, 115 ft. on Washington St. at 0/7.

Maynor Dyson for lot No. 19, 50 ft. on Main Street at 1/1.

John Warren for lot No. 20, 50 ft. on Main Street at 0/6.

Richard E. Lee for lot No. 21, 50 ft. on Main Street at 0/7.

Edward Archer for lot No. 22, 50 ft. on Parker Street at 0/3.

Frederick Williams for lot No. 23, 50 ft. on Parker Street at 0/4.

William Nivison for lot No. 24, 78 ft. on Parker Street at 0/5.

William Graves for lot No. 25, 100 ft. on Water Street at 1/9.

James Boyce for lot No. 26, 100 ft. on Kelly Street at 0/9.

David Patterson for lot No. 27, 115 ft. on Front to Channel at 6/8.

John S. Calvert for lot No. 28, 45 ft. on Matthews St. at 4/0.

Archer & Capron for lot No. 29, 114 ft. on front to Channel at 2/1.
Donald Campbell for lot No. 30, 50 ft. on Matthews St. at 2/6.
Frederick Williams for lot No. 31, 50 ft. on Matthews St. 2/0.
William Nivison for lot No. 32, 50 ft. on Matthews St. at 1/6.
William Stoakes for lot No. 33, 72 ft. on Matthews St. at 0/10.
David Patterson for lot No. 34, 50 ft. on Parker St. at 0/4.

8- 9- 2.

Norfolk, August 24, 1792.

JOHN CALVERT.
JOHN SMALLWOOD.
PHILIP RITTER.
JOHN WOODSIDE.
JOHN INGRAM.

NORFOLK BOROUGH:

At a meeting of the Common Council on the 4th day of July, 1797:

The Commissioners appointed by the last Hall to make sale of certain lots of the Town Point land, made report of their proceedings therein in the following words, to-wit:

"The Commissioners appointed by order of the Common Hall to lease out such of the lots on the Town Point as were forfeited either by neglect or default of the original lessees in not complying with the conditions of their leases, report as follows, namely: That in pursuance of the order, they, on the 22nd of June last proceeded to lease the following lots forfeited for a non-compliance with the Sixth article of the condition, namely: Nos. 5, 7, 14, 15, 20, 23, 24, 25, 30, 31, 32 and 33, being only twelve lots which now produce a rent (as per enclosed statement) of £223, 17 shillings, 2 pence more than they produced on the first sale. Your Commissioners report that it appears to them impracticable to recover any arrearages or rents due on the aforesaid lots, as the only penalty incurred by the delinquent lessees was the subjecting their lots to a second sale in two months after the first, which, by remissness or negligence on the part of the Hall, was not done at the time. They suggest also to the wisdom of the Hall the necessity of appointing persons to receive bonds and give leases in conjunction with those appointed in behalf of the Court to the lessees of the above twelve lots, as the powers of your present Commissioners expired on the 22nd of June. Your Commissioners further report that some of the proprietors of these lots having regularly paid their rents, although they did not comply with the Sixth condition, considered the property or the surplus of the rent as still belonging to them since the Hall tacitly acknowledged them as lessees by the Chamberlain's acceptance of the rent, they claim therefore the difference of rent for them and their heirs forever. Your Commissioners observe on the subject that all lots forfeited for a non-compliance with the sixth articles of the conditions reverted in consequence to the Corporation, and can be subject to no future demand of the first lessees as the conditions runs thus: "That the lots shall be again set up to the highest bidder, and the first lessee shall be answerable for

the deficiency, if any, between the first and last prices." No mention whatever is here made that any surplus that might appear should be sold for their benefit. The grounds of the claim mentioned in the *proceeding* clause appear to have arisen from the wording of the fifth article of the conditions, which says in case of forfeiture and sale under that particular article: "The over-plus money, if any, will be paid to the first lessee." But your Commissioners report that all the lots leased by them were forfeited by want of bond and security, and coming within the purview of the sixth article only are subject to no surplus demand, as no such advantage is by this article given to the original lessees. Your Commissioners further report some of the first proprietors have contended that they tendered bond and security in time, but the sixth article expressly declaring that such bond and security must be tendered to a majority of the Commissioners, and no proof appearing to validate the assertion their leases have been considered by us as null. Your Commissioners finish their report by observing that the Town Point land producing a large income, and superceding the necessity of several taxes, demand the serious attention of the Hall, in order that the rents in future may be more regularly paid, it appearing from the Chamberlain's last statement that upwards of £1,300 would have been due in the month of August next ensuing. Thomas Blanchard, John Woodside, Moses Myers, John Calvert: Norfolk, 3rd June, 1797.

The said report was read, received and ordered to be recorded.

THIS PAGE IS BOUND VERTICAL IN BOOK

51 **MEMO.**

The Statement Alluded to in the Foregoing Report:

Number of lots sold.	Purchasers' names.	No. of feet.	On what street sold.	How much per foot.	What sum per name.
#5	Levin Dorsey	70 ft.	on Water St.	14/1	49- 5-10
7	Jas. Dickenson	31 "	" Kelly "	8/2	33- 1- 6
14	Luke Wheeler	45 "	" Washington St.	9/7	21-11- 3
15	Conway Whittle	45 "	" " "	15/4	34-10- 1
19	Phineas Dana	50 "	" Main St.	3/7	8- 9- 2
20	Sam'l Marsh & Richard Spratley	50 "	" Main St.	1/7	3-19- 2
23	McClure & Moore	50 "	" Parker St.	2/6	6- 5- 0
24	Benj. Payne & Jas. Christie	78 "	" Parker St.	3	11-14- 0
25	Conway Whittle	100 "	" Water St.	4/11	24-11- 8
30	David Patterson	50 "	" Mathew St.	7/10	19-11- 8
31	Chas. S. Boush	50 "	" Mathew St.	3/8	9- 3- 4
32	Jas. Dickenson	50 "	" Mathew St.	1/8	4- 3- 4
33	Jas. Dickenson	72 "	" Mathew St.	1/8	6- 0- 0
					£223-16-9

52 The following is Exhibit "B," filed with the foregoing Amended Bill.

(See page 13 of this record.)

The following is Exhibit "C," filed with the foregoing Amended Bill.

(See page 20 of this record.)

The following *is* Exhibits "D" and "E," filed with the foregoing Amended Bill.

VIRGINIA:

In the Corporation Court of the City of Norfolk, on the 31st day of October, 1898.

This day came Wm. H. White, who alleges that he is aggrieved by the entry in the land books made by W. W. Dey, commissioner of the revenue for the said city for the year 1895, page 136, line number 12, whereby he is charged with two hundred and fifty-six dollars city taxes for the year 1895, on a tract of land containing —— acres, described as Lot No. 9, Town Point Lots, City of Norfolk.

And thereupon the said Wm. H. White moved the court to exonerate him from the payment of two hundred and fifty-six dollars of the city taxes so erroneously charged against him for said year; which motion was defended by Robt. W. Shelton, the attorney for the said city, and the said W. W. Dey, the commissioner who made the assessment, was examined as a witness touching the application.

And it appearing that said book in which said alleged erroneous entry has been made was delivered to the treasurer of the said city on the 30th day of October, 1895, and that application for redress against the erroneous entry was made on this day for the first time, and it appearing that the said Wm. H. White is not the owner of the said property, but that it is the property of the City of Norfolk. All which the court certifies as facts proved upon the application aforesaid.

On consideration whereof, and from such facts so proved, the court is satisfied that the said Wm. H. White is erroneously charged in said book with city taxes amounting to two hundred and fifty-six dollars.

Whereupon it is ordered by the court that the said Wm. H. White be exonerated from the payment of two hundred and fifty-
53 six dollars city taxes, so erroneously charged, and the penalty, if any, if not already paid, and, if paid, that it be refunded to him.

This day came Wm. H. White, who alleges that he is aggrieved by an entry in the land book made by W. W. Dey, commissioner of the revenue for said City of Norfolk for the year 1895, page 187, line number 3, whereby he is charged with one hundred and four dollars, State taxes for the year 1895, on a lot of land described as 47-49 Main and Fayette Streets.

And thereupon the said Wm. H. White moved the court to exonerate him from the payment of one hundred and four dollars of the State taxes so erroneously charged against him for said year, which motion was defended by E. M. Baum, the attorney for the Commonwealth for the said city, and the said W. W. Dey, the commissioner who made the assessment, was examined as a witness touching the application.

And it appearing that said book in which said alleged erroneous entry has been made was delivered to the treasurer of the said city on the 16th day of February, 1895, and that application for redress against the erroneous entry was made on this day for the first time, and it appearing that the said Wm. H. White is not the owner of the said property, but that it is the property of the City of Norfolk.

All of which the court certifies as facts proved upon the application aforesaid.

On consideration whereof and from such facts so proved, the court is satisfied that the said Wm. H. White is erroneously charged in said book with State taxes amounting to one hundred and four dollars.

Whereupon it is ordered that the said Wm. H. White be exonerated from the payment of one hundred and four dollars State taxes so erroneously charged, if not already paid, and if paid, that it be refunded to him.

A copy.

Teste:

JAMES V. TREHY, *Clerk.*
By THOS. B. WRIGHT, *D. C.*

VIRGINIA:

In the Corporation Court of the City of Norfolk, on the 23rd Day of November, 1894.

This day came Wm. H. White who alleges that he is aggrieved by an entry in the land book made by W. W. Dey, commissioner of the revenue for the City of Norfolk for the year 1894, page 135, line number 13 whereby he is charged with two hundred and fifty-five dollars city taxes for the year 1894, on a certain lot of land lying in the City of Norfolk described as follows: No. 9 Town Point
54 Lots, and thereupon the said Wm. H. White moved the court to exonerate him from the payment of two hundred and fifty-five dollars city taxes so erroneously charged against him for said year, which motion was defended by the attorney for the said city, and the said W. W. Dey the commissioner who made the assessment was examined as witness touching the application.

And it appearing that said book in which said alleged erroneous entry has been made was delivered to the treasurer of said city on the 17th day of August, 1894, and that application for redress against the erroneous entry was made on this day for the first time; and it appearing that the said Lot No. 9 is not the property of the said Wm. H. White but is owned by the City of Norfolk.

All of which the court certifies as facts proved upon the application aforesaid.

On consideration whereof and from such facts so proved the court is satisfied that the said Wm. H. White is erroneously charged in said book with city taxes amounting to two hundred and fifty-five dollars.

Whereupon it is ordered that the said Wm. H. White be exonerated from the payment of two hundred and fifty-five dollars city taxes so erroneously charged and the penalty thereof, if not already paid, and if paid, that it be refunded to him.

This day came Wm. H. White who alleges that he is aggrieved by an entry in the land book made by W. W. Dey, commissioner of the revenue for the City of Norfolk for the year 1894, page 118, line number 21, whereby he is charged with one hundred and four dollars State taxes for the year 1894, on a certain lot of land lying in the City of Norfolk described as follows #9 Town Point Lot. And thereupon the said Wm. H. White moved the court to exonerate him from payment of one hundred and four dollars the State taxes so erroneously charged against him for said year, which motion was defended by E. M. Baum, the attorney for the Commonwealth of said city and the said W. W. Dey, the commissioner who made the assessment was examined as witness touching the application.

And it appearing that said book in which said alleged erroneous entry has been made was delivered to the treasurer of the said city on the 1st day of June, 1894, and that application for redress against the erroneous entry was made on this day for the first time; and it appearing that said Wm. H. White is not the owner of said Lot No. 9, Town Point Lots, but that the same is owned by the City of Norfolk.

55 All which the court certifies as facts proved upon the application aforesaid.

On consideration whereof and from such facts so proved, the court is satisfied that the said Wm. H. White — erroneously charged in said book with State taxes amounting to one hundred and four dollars.

Whereupon it is ordered that the said Wm. H. White be exonerated from the payment of one hundred and four dollars, State taxes, so erroneously charged, and the penalty, if not already paid, and if paid, that it be refunded to him.

A copy—Teste:

JAMES V. TREHY, *Clerk.*
By THOS. B. WRIGHT, *D. C.*

The following is Exhibit "F," filed with the foregoing amended bill.

In the Corporation Court of the City of Norfolk, on the 30th Day of July, 1895.

Present: Hon. Allen R. Hanckel, Judge.

This day came Wm. H. White, who alleges that he is aggrieved by an entry in the land book for re-assessment of lands in Norfolk

City made by L. T. Gwathmey, J. A. Winslow and William Pannill, assessors for the City of Norfolk, appointed by the said court under an act of the General Assembly of Virginia, entitled "An act regulating the appointment of assessors of lands and lots in the City of Norfolk, and providing for compensation of same" approved March 5th, 1894, the said entry being made in said land book for the year 1895, page 189, line number 34, whereby he is charged and assessed with a tract or lot of land in fee described as follows: "Main & Fayette Strs., Town Point Lots":

And thereupon the said Wm. H. White moved the court to have the said entry corrected and the same stricken from said books, which motion was defended by E. M. Baum, the attorney for the Commonwealth for said city and the said Jos. A. Winslow the assessor who made the said assessment was examined as a witness touching the said application.

And it appearing that prior to July 1st, 1895, a copy of the said book in which the said alleged erroneous entry and assessment has been made, was filed in the clerk's office of said court and a copy thereof delivered to the commissioner of the revenue for said city, and another copy transmitted to the auditor of public accounts for the state of Virginia, and the application for redress against the said erroneous entry and assessment was made on this day for the first time and it appearing that the said tract or lot of land
56 should not have been listed for taxation against the said Wm. H. White, the same being the property of the City of Norfolk, and as such exempt from taxation under section 457, of the Code of 1887, and also for the further reason that it appears from the testimony of the said assessors that the said entry was made through clerical error. All which the court certifies as facts proved upon the application aforesaid. On consideration whereof and from such facts so proved, the court is satisfied that the said Wm. H. White is erroneously charged and assessed in said book with the property above described.

Whereupon it is ordered that the said entry be erased and the said property be stricken from said book and the several copies thereof.

A copy—Teste:

CORA V. GRIFFITH, *D. C.*

And now at this day, to-wit: In the Circuit Court aforesaid, on the 10th day of May, 1907.

This day the defendants, W. L. Baker, city collector, and the City of Norfolk, appearing by counsel, came and asked for leave to file their demurrer and answer to the amended bill of complaint hereinbefore filed, which motion being granted, the said demurrer and answer are accordingly filed, in which demurrer the complainant by counsel joins, and this cause coming on to be again heard upon the papers formerly read, and upon the demurrer and answer of the said defendants, and was argued by counsel. Whereupon the court upon due consideration doth overrule said demurrer, and being further of opinion that the said complainant is entitled to a perpetual injunction as contained in the prayer of the bill of complaint,

and amended bill herein filed, doth adjudge, order and decree that the said defendants W. L. Baker, city collector, and his successor or successors in office, and the City of Norfolk, its officers, agents, servants and attorneys, and all other persons be, and they are perpetually restrained and enjoined from taking any steps toward the collection of the taxes and assessments as set out in said bill of complaint and said amended bill of complaint herein filed, and that the same are declared to be null and void and of no effect so far as the complainant personally or his interest in the property particularly set out and described in said bill of complaint and amended bill of complaint are concerned. And it is further adjudged ordered and decreed that the plaintiff recover against the defendants their legal costs.

And the purposes of this suit having been accomplished, it is ordered that the same be stricken from the docket.

57 VIRGINIA:

In the Clerk's Office of the Circuit Court of the City of Norfolk, of the 16th Day of July, 1907.

I, Laurence Waring, clerk of the Circuit Court of the City of Norfolk, do hereby certify that the foregoing is a true abstract of the record in the suit of William H. White, plaintiff, against W. L. Baker, city collector, and the City of Norfolk, defendants, lately pending in the Circuit Court of the City of Norfolk.

I further certify that the same was not made up and completed until the plaintiff's counsel had received due notice of the making of the same and of the intention of the defendants to appeal.

Teste:

LAURENCE WARING, *Clerk.*

Fee for this record $24.00.

A copy—Teste:

H. STEWART JONES, *C. C.*

58 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Friday the, 31st Day of January, 1908.

CITY OF NORFOLK, Appellant,
against
J. W. PERRY Co., a Corporation, and JOHN L. ROPER, Appellee.

Upon an Appeal from and Supersedeas to a Decree Pronounced by the Circuit Court of Norfolk County on the 6th Day of May, 1907.

and

CITY OF NORFOLK, Appellant,
against
WILLIAM H. WHITE, Appellee.

Upon an Appeal from and Supersedeas to a Decree Pronounced by the Circuit Court of Norfolk County on the 10th Day of May, 1907.

These causes were this day fully heard upon the transcripts of the record of the decrees aforesaid and arguments of counsel; but, because the court here is not yet advised of its decree to be pronounced in the premises, time is taken to considere thereof.

A Copy—Teste:

H. STEWART JONES, *C. C.*

59 Circuit Court of City of Norfolk.

CITY OF NORFOLK
v.
WHITE.

Opinion by Judge George M. Harrison.

RICHMOND, VA., *March* 12, 1908.

This case was heard with the case of City of Norfolk v. J. W. Perry Co., &c., in which the opinion of this court is here. In essential facts the cases are substantially the same.

The claim made herein, that the right of the City of Norfolk to enforce the tax complained of was *res adjudicata,* was without merit and properly abandoned at bar.

In this case, the original lease contract, dated in 1792, provided that the lessee, his executors, administrators and assigns, should pay or cause to be paid to the person or persons authorized to receive the same, "the public and other taxes which shall accrue on the said land."

In September, 1890, the common and select councils of the city of Norfolk, by resolution, authorized their presidents to execute on behalf of the city, "a renewal of the said lease for another term of ninety-nine years, renewable forever, according to the terms
60 thereof." This resolution is recited on the face of the renewal lease contract, dated Sept. 1890. In this renewal lease the language of the original covenant, obliging the lessee to pay "the public and other taxes which shall accrue on the said land," is changed by the substitution therefor of these words, to pay "all taxes, State and national, which shall accrue on the said land." This departure from the terms of the original covenant, with respect to the payment of taxes, was made by the draughtsman of the renewal lease without the authority of the councils of the City of Norfolk, as plainly shown by the resolution of such councils, which is recited on the face of the new lease. That resolution expressly provides that the renewal lease shall be according to the terms of the original lease; and it was clearly intended when the renewal lease was execute- that the terms and conditions thereof should be the same as those contained in the original lease. It is further clear from the recitation in the renewal lease of the resolution of the councils, that the appellee took with knowledge of such intention, and is therefore bound to pay the taxes assessed upon the property according to the terms of the covenant contained in the original lease, and not according to the restricted terms, "State and national taxes," employed in the renewal lease.

61 The other contentions made herein are the same as those put forward in City of Norfolk v. J. W. Perry Co., &c., and are controlled by the decision in that case.

For the reasons there given, in addition to what is here said, we are of opinion that no right of the appellee under his lease contract, has been violated by the tax imposed by the City of Norfolk, and, therefore, the decree appealed from, enjoining the collection of such tax, is erroneous, and must be reversed, and this court proceeding to enter such decree as the circuit court should have rendered, it is ordered that the temporary injunction granted herein be dissolved, and the complainant's bill be dismissed.

Reversed.

62 VIRGINIA:

In the Supreme Court of Appeals, held at the Library Building in the City of Richmond on Thursday, the 11th day of March, 1908.

CITY OF NORFOLK, Appellant,
against
WILLIAM H. WHITE, Appellee.

Upon an Appeal from and Supersedeas to a Decree Pronounced by the Circuit Court of Norfolk County on the 10th Day of May, 1907.

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decree afore-

said and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that no right of the appellee under his lease contract, has been violated by the tax imposed by the city of Norfolk, and that the decree appealed from enjoining the collection of such tax is erroneous. It is therefore adjudged, ordered and decreed that the said decree be reversed and annulled, and that the appellant recover of the appellees its costs by it expended about the prosecution of its appeal and supersedeas aforesaid here.

And this Court proceeding to pronounce such decree as the said circuit court ought to have pronounced, it is adjudged, ordered and decreed that the temporary injunction granted herein be and the same is hereby dissolved, that the bill of the complainant be dismissed, and that the defendant recover of the complainant its costs by it about its defence in said circuit court expended.

Which is ordered to be certified to the said Circuit Court.

A copy—Teste:

H. STEWART JONES, *C. C.*

Appellant's costs: $130.64.
Certified July 3, 1908.

63 In the Supreme Court of Appeals of Virginia, at Richmond.

CITY OF NORFOLK
against
WILLIAM H. WHITE.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that the foregoing printed record, contained in fifty-seven pages and one page index, and five additional manuscript pages, is a true and perfect copy of the record of the suit aforesaid remaining in the Clerk's Office of the said Court at the City of Richmond, Virginia, upon which said record the case was heard tried and determined by the court aforesaid.

In witness and attestation whereof, I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this, the 9th day of November, 1908.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, James Keith, one of the Judges, and President of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing attestation made by H. Stewart Jones, the Clerk of the said Court

at Richmond, is in due form, and that the foregoing is his true and genuine signature.

Given under my hand and seal this 9th day of November, 1908.

JAMES KEITH, [SEAL.]
President Supreme Court of Appeals of Virginia.

63½ STATE OF VIRGINIA,
City of Richmond, To wit:

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, one of the judges and President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court this the 9th day of November, 1907.

[Seal Supreme Court of Appeals of Virginia, Richmond.]
H. STEWART JONES, *Clerk.*

64 Supreme Court of Appeals of the State of Virginia.

CITY OF NORFOLK, Appellant,
vs.
WM. H. WHITE, Appellee.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of Appeals of Virginia in rendering judgment against him in the above entitled case, the appellee, Wm. H. White, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States.

Assignments of error herewith.

WALTER H. TAYLOR,
WILLIAM LEIGH WILLIAMS,
TAZEWELL TAYLOR,
Attorneys for Wm. H. White, Appellee.

STATE OF VIRGINIA,
Supreme Court of Appeals:

Let the writ of error issue upon the execution of a bond by Wm. H. White to the City of Norfolk in the sum of One Thousand Dollars, said bond, when approved, to act as a supersedeas.

Dated this 9th day of November, 1908.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

65 In the Supreme Court of Appeals of the State of Virginia.

CITY OF NORFOLK, Appellant,
vs.
WM. H. WHITE, Appellee.

Assignments of Error.

Comes now the appellee in the above entitled cause and shows that in the record and proceedings in said cause the Supreme Court of Appeals of the State of Virginia erred to the grievous injury of the appellee herein, and to the prejudice and against the rights of the said appellee in the following particulars, to-wit:

1st. The said Supreme Court of Appeals of the State of Virginia erred in holding that, under the pleadings and proofs submitted in this cause, there was a contract or agreement whereby Wm. H. White, the appellee, or his predecessor in title, agreed to pay the taxes assessed by the City of Norfolk on the land and buildings in the pleadings and proofs mentioned, and in further holding that the attempt to impose said taxes upon, and collect the same from, the said appellee, in pursuance of the Constitution and laws of the State of Virginia passed subsequent to said contract did not impair the obligation of the contract existing between the said appellee, as the successor in title to the original party thereto, and the appellant, the City of Norfolk, in contravention of the terms of the Constitution of the United States, and especially Article 1, Section 10 of the same.

66 2nd. The said Supreme Court of Appeals of the State of Virginia erred in holding that, under the pleadings and proofs submitted in this cause, there was authority vested in the City of Norfolk, Appellant, as the taxing power, to collect the said taxes on the land and buildings in the pleadings and proofs mentioned from Wm. H. White, appellee, and in failing to find that said alleged authority, together with any provisions of the Constitution of the State of Virginia, the Acts of the General Assembly of the State of Virginia, the charter of the City of Norfolk, Virginia, and the ordinances and resolutions of the councils of the said City of Norfolk, Virginia, passed subsequent to said contract, conferring or attempting to confer, such authority, are void, as impairing the obligation of the contract between the said Wm. H. White, appellee, and the said City of Norfolk, appellant, in violation of Article 1, Section 10, of the Constitution of the United States, and also in failing to find that said contract, even though it had reference to City taxes, only gave the City of Norfolk, upon the failure of the said Wm. H. White, appellee, to pay the same, a right of action based upon the said contract, and no right to distrein or levy on the goods and property of the said Appellee, in advance of a judgment, as has been threatened and attempted by the officers and servants of the said City of Norfolk, appellant, in pursuance of the Constitution and laws of the State of Virginia, passed subsequent to said contract,

thereby impairing the obligation of said contract in violation of Article 1, Section 10, of the Constitution of the United States.

3rd. The said Supreme Court of Appeals of the State of Virginia erred in holding that no right of the said Wm. H. White, the appellee, under his lease contract has been violated by the tax imposed by the City of Norfolk, but, on the contrary, it should have held that the same impairs the obligation of the contract existing between the said Wm. H. White, appellee, and the said City of Norfolk, the appellant, in violation of Article 1, Section 10, of the Constitution of the United States.

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4th. The said Supreme Court of Appeals of the State of Virginia erred in not affirming the judgment of the trial Court, and in not giving the appellee his rights under Article 1, Section 10, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

5th. The said Supreme Court of Appeals of the State of Virginia erred in holding that the tax in question did not violate the implied terms of the demise from the City of Norfolk, the appellant, or its predecessors in title, to Wm. H. White, the appellee, or his predecessor in title, for the reason that a demise is a contract on the part of the lessor that the lessee shall have quiet and peaceable possession of the premises granted, free from any act or acts committed by, or on behalf of, the said lessor, said tax thereby impairing the obligation of said contract in violation of Article 1, Section 10, of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

Wherefore, for these and other manifest errors appearing in the record, the said Wm. H. White, appellee, prays that the judgment of the said Supreme Court of Appeals of the State of Virginia be reversed and set aside and held for naught, and that judgment be entered for the appellee, granting him his rights under the Constitution of the United States, and the appellee also prays judgment for his costs.

WALTER H. TAYLOR,
WILLIAM LEIGH WILLIAMS,
TAZEWELL TAYLOR,
Attorneys for Wm. H. White, Appellee.

68

Supreme Court of the United States.

WM. H. WHITE, Plaintiff in Error,
vs.
CITY OF NORFOLK, Defendant in Error.

Bond.

Know all men by these presents: That we, Wm. H. White, as principal, and W. H. T. Loyall and Walter H. Taylor, as sureties, are held and firmly bound unto the City of Norfolk, Virginia, in the sum of One Thousand Dollars ($1,000.00), to be paid to the

said City of Norfolk, for which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of October, 1908.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above entitled suit by the Supreme Court of Appeals of Virginia;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may attach, if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

WM. H. WHITE. [SEAL.]
W. H. T. LOYALL. [SEAL.]
WALTER H. TAYLOR. [SEAL.]

69 STATE OF VIRGINIA,
Corporation of the City of Norfolk ss:

W. H. T. Loyall and Walter H. Taylor being each duly sworn, on oath depose and say: We are each of lawful age, and are citizens of the State of Virginia, and know the contents of the foregoing instrument, to which we have attached our names, and we each for himself say we are worth the sum of One Thousand Dollars, over and above all debts, liabilities and exemptions.

W. H. T. LOYALL.
WALTER H. TAYLOR.

Subscribed and sworn to before me this 22nd day of October, 1908.

G. M. PAYNE,
Notary Public.

[OFFICIAL SEAL.]

The above bond is approved.

(Signed) JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing supersedeas bond was lodged with the Clerk of the Supreme Court of Appeals of the State of Virginia on Nov. 4th, 1908, and the following endorsement made thereon: "Bond filed Nov. 4, 1908."

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia at Richmond.

[Endorsed:] Bond filed Nov. 9/08.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of the State of Virginia:

Because in the record and proceedings, as also the rendition of judgment in a plea which is in the said Supreme Court of Appeals of Virginia, before you, at the March Term, 1908, thereof, between the City of Norfolk, Appellant, versus Wm. H. White, Appellee, a manifest error has happened, to the great damage of the said Wm. H. White, Appellee, as by his complaint appears, we being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid, being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this Nov. 9th, 1908.

Done in the City of Richmond, with the seal of the Circuit Court of the United States for the Eastern District of Virginia attached.

[OFFICIAL SEAL.] JOSEPH P. BRADY,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

[Endorsed:] Writ of error. Filed Nov. 9, 1908.

71 Allowed:

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

Writ of error filed Nov. 9", 1908.

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of the State of Virginia on Nov. 9", 1908, and also at the same time placed a copy thereof for the City of Norfolk. The following endorsement was made upon said original writ and upon the copy:

Writ of error filed Nov. 9", 1908.

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Norfolk, Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of Virginia, wherein Wm. H. White is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 9th day of November, 1908.

[SEAL.] JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

Attest:
H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia.

NORFOLK, VA., *November 11th,* 1908.

I, Nath'l T. Green, attorney of record for the defendant in error, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

NATHANIEL TERRY GREEN,
Attorney for the City of Norfolk, Virginia.

73 UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Appeals of the State of Virginia in the City of Richmond, this 9th day of Nov., 1908.

[OFFICIAL SEAL.] H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond.

74 [Endorsed:] Loyall, Taylor and White, Law Building, 40 Plume Street, Norfolk, Virginia.

Endorsed on cover: File No. 21,420. Virginia Supreme Court Appeals. Term No. 104. William H. White, plaintiff in error, vs. The City of Norfolk, Virginia. Filed November 18th, 1908. File No. 21,420.

Supreme Court, U. S.
FILED.
NOV 29 1910
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 103.

J. W. PERRY COMPANY AND JOHN L. ROPER, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

TAZEWELL TAYLOR,
Counsel for Plaintiffs in Error.

WALTER H. TAYLOR,
WILLIAM LEIGH WILLIAMS,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 103.

J. W. PERRY COMPANY AND JOHN L. ROPER, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This cause comes to this court upon a writ of error from the Supreme Court of Appeals of Virginia, to review and reverse a judgment of that court reversing a decree of the Circuit Court of the city of Norfolk, Virginia, granting an injunction restraining the defendant in error from collecting certain city taxes sought to be collected from the plaintiffs in error.

The plaintiffs in error commenced these proceedings in the Circuit Court of the city of Norfolk, Virginia, against the defendant in error, city of Norfolk, to enjoin the collection

of city taxes upon certain real estate in that city, of which the said city of Norfolk is the fee-simple owner and they are the lessees from the city, which taxes, they allege, are illegal as impairing the obligation of their contract. The decision of the case in the Circuit Court resulted in a final decree in favor of the lessees, enjoining the city of Norfolk from attempting to collect said taxes. Upon appeal to the Supreme Court of Appeals of Virginia this decree was reversed, and the lessees have brought the case to this court upon a writ of error to review the judgment of that court finding against their contention.

Statement of the Case.

The bill of complaint makes the following allegations:

By a deed dated the 1st day of August, 1792, James Taylor and others, as directors and trustees of certain land in the borough of Norfolk, known as "The Town Point Company's Land," in pursuance of authority vested in them by an act of the General Assembly of Virginia, and in consideration of the sum of two thousand pounds, current money, conveyed to the mayor, recorder, aldermen and common councilmen of the borough of Norfolk the said "Town Point Company's Land," "in trust for the benefit and advantage of the said borough" (the predecessor in title of the defendant in error). (See deed, printed Record, page 14.) Upon the acquisition of this land by the borough it proceeded to subdivide the same and lease it out in parcels for the term of ninety-nine years, with the option on the part of the respective lessees at the end of their terms to renew said leases for additional terms of ninety-nine years, and so on forever.

All of the said land so acquired was almost immediately so leased, and the aggregate annual rental derived by the borough from the same exceeded the sum of 546 pounds sterling, or more than 27 per cent annual income upon the total purchase price of the said land.

Among the pieces of land so leased was that known as "lot No. 10" on the plan of the Town Point Land, which was leased for the term of ninety-nine years, with the option to renew the lease, to one Richard Evers Lee, by deed dated the 21st day of June, 1797, at an annual rental of six pounds 15 shillings, the present equivalent of which in United States money is $22.50. In the original deed of lease to Lee (Printed Record, page 15 *et seq.*) it is provided that "said Lee, his executors, administrators or assigns, will pay or cause to be paid, to the person or persons authorized to receive the same, the public taxes which shall become due on the said land." The leasehold estate thereby granted, by various mesne assignments, became vested in one Caroline Fleming Hare, and on the 15th day of May, 1895, the defendant in error, the City of Norfolk, which in the meantime had succeeded to the title, rights and obligations of the said borough of Norfolk, executed and delivered, as provided in said original deed of lease, a renewal of the same to Harriet Hare McClellan and E. Spencer Miller, executors of the said Caroline Fleming Hare, the latter in the meantime having died. (See renewal lease, printed Record, page 19 *et seq.*)

The essential stipulations of the said renewal lease are identical with those contained in the original lease, that is, that the lessee will pay the annual rental of $22.50, and will also "pay to the person or persons authorized to receive the same the public taxes which shall become due on the said land." The leasehold thus conveyed by the original and renewal deed is now vested in the plaintiffs in error, J. W. Perry Company, a Corporation, and John L. Roper, who acquired the same from the executors of the said Caroline Fleming Hare, and have erected valuable buildings and improvements thereon.

In the year 1906 the city of Norfolk, through the commissioner of revenue, the officer authorized to make assessments of real estate for the purpose of taxation, caused the

lot of which the plaintiffs in error hold the lease to be assessed for city taxes. In this assessment it is set out that the city of Norfolk is the fee-simple owner of the land, and said land is so assessed to it, the city of Norfolk, as the fee-simple owner. The bill of complaint further alleges that it is the purpose of the city of Norfolk to endeavor to collect the said taxes so assessed by itself, as the taxing power, against itself, as the fee-simple owner, out of the lessees, the plaintiffs in error. It is also alleged that the city of Norfolk, through its commissioner of revenue, has had the improvements upon the said lot assessed to the lessees for the year 1906. The bill of complaint further alleges that said assessments so made in pursuance of alleged municipal authority, impaired the obligation of the contract between the said lessees and the city of Norfolk, in contravention of article 1, section 10 of the Constitution of the United States.

The bill of complaint further sets up other jurisdictional facts not important to the present controversy.

To the bill of complaint the defendant in error filed its general demurrer and answer, which demurrer being overruled, a perpetual injunction, as prayed in the bill of complaint, was granted, enjoining the city of Norfolk, its agents, servants, and all other persons, from taking any steps towards the collection of the taxes and assessments, as set out in said bill. From the decree granting said injunction an appeal was taken by the city of Norfolk to the Supreme Court of Appeals of Virginia, the court of last resort in Virginia, which court, after argument, reversed the decision of the Circuit Court, and held that no contract right of the lessees had been impaired by the action of the city, and thereupon held the lessees liable for city taxes on both the land and buildings for the year 1906. (See opinion of Supreme Court of Appeals of Virginia, printed Record, page 25 *et seq.*) The lessees thereupon sued out this writ of error, and the matter is now here for review.

Specification of Errors.

It is most respectfully urged that the ruling of the Supreme Court of Appeals of Virginia is erroneous in failing to find that the acts of the Legislature of Virginia, and the ordinances of the city of Norfolk, passed in pursuance thereof, imposing the taxes in question, were illegal as impairing the obligation of the contract between the city and the lessees, in contravention of article 1, section 10 of the Constitution of the United States.

The construction of the terms of the contract, its obligation, and its impairment by subsequent legislative acts, we shall discuss in detail in the argument which follows.

ARGUMENT.

It is contended by the plaintiffs in error that the city of Norfolk is the fee-simple owner of the land in question, and that the plaintiffs in error are simple lessees of the same; that in the absence of a covenant on the subject, the fee-simple owner is uniformly required to pay all taxes upon his estate; that in this case the lessees have obligated themselves to pay the "public taxes" upon said land, which, it is most earnestly contended, means only such taxes as the city of Norfolk, the fee-simple owner, is required to pay to an independent taxing power.

The Supreme Court of Appeals of Virginia has, however, briefly disposed of this position with the statement that the lessees are the substantial owners of the property, and are consequently liable for all taxes accruing on the same. It therefore becomes necessary for this court, consistent with its authority and duty, to determine upon its own independent investigation the character of the contract existing between the parties, the obligation growing out of the same, and whether or not this obligation has been impaired by

subsequent legislation of the State of Virginia and its creature the city of Norfolk.

The authority and duty of this court in the premises is well defined in the following quotation from Jefferson Branch Bank *vs.* Skelly, 1 Black, 436; 17 L., 173:

> "We answer to this, as this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions, have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of States 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States, which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in

reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

See also:

Life Ins. & Trust Co. *vs.* Debolt, 16 How., 416, 432;

L. & N. R. R. Co. *vs.* Palmer, 109 U. S., 244;

Bryan *vs.* Board of Education, 151 U. S., 639.

Not only does this court in a case of this character determine the existence or non-existence of the alleged contract, but its duty requires it to go further and determine the rights and obligations growing out of the contract, in the event any is found to exist.

It is said in Huntington *vs.* Attrill, 146 U. S., 657:

"The case in this regard is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

In Bryan *vs.* Board of Education, 151 U. S., 639, it is said:

"So that it is necessary to inquire as to the existence and effect of the alleged contract, and that question must be determined by this court upon its own judgment, independently of any adjudication" (by the State court).

In Mobile & Ohio R. Co. *vs.* State of Tennessee, 153 U. S., at page 495, it is said:

> "The legal existence of the contract itself and its proper construction is necessarily involved in the question of the alleged impairment of the obligations thereof."

Assuming, therefore, the authority of this court in the premises to be plenary, and that it has authority to examine the contract in question upon principle, let us next consider the alleged contract and the rights and obligations arising from the same.

The Contract is a Lease.

Let the position of the plaintiffs in error be well understood at the outset. This is not an effort by the lessees to establish an exemption from liability for taxes on their leasehold interest. Whatever their interest in the property is may be legally taxed in common with all other similar interests; this they recognize. But the effort in this case by the city of Norfolk is to make the lessees pay the city taxes on its fee-simple estate by virtue of a covenant which it is earnestly contended only applies to taxes other than those attempted to be collected by the city of Norfolk. The question then finally to be determined is: "Does the covenant in the lease obligate the lessees to pay to the city of Norfolk city taxes on its reversionary interest?" And if this question is answered in the negative, the next question is whether the obligation of the lessees' contract is impaired by the effort on the part of the city to make them do so.

It will be seen from the foregoing statement of the case and the specification of error that the city of Norfolk as the fee-simple owner of certain real estate within its physical limits has assessed itself with the city taxes thereon, and is now endeavoring to have the plaintiffs in error, the lessees

of said property, pay said taxes in pursuance of a stipulation that they would "pay or cause to be paid the public taxes on said property."

In the consideration of the validity of this claim we will first call the attention of the court to the real relation existing between the parties to this contract, and also the specific obligations growing out of that relation.

We conceive that it is only necessary to refer to the formal lease to establish the fact that the relation between the city of Norfolk and these lessees is that of landlord and tenant. It is true that the tenancy extends over the term of ninety-nine years, and that the same, under certain conditions, may be renewed for a further term, but it will be at once seen that this fact affects only the duration of the tenancy, and does not in any sense change or enlarge the character of the relation existing between the parties. The law has never undertaken to set any limit of years upon the duration of a lease. That the purpose of the parties to said original lease and the renewal thereof is entirely consistent with this view is borne out by an inspection of these papers themselves.

The consideration for the use of the land is the payment of a certain compensation designated as "rent" and the performance of certain conventional covenants and stipulations found only in leases. The original deed of lease recites that the common council directed certain parties to "lease" out the land; it further recites that in pursuance of such authority said parties did "lease" out the same at an annual "rent," and it recites the authority to "convey the said land to the several lessees"; it further recites as a consideration for the demise the payment of the yearly rent and the performance of certain covenants, and in conveying the same uses these technical expressions which apply solely to a lease, and to no other conveyance: "Do demise, lease and to farm let," and in the habendum clause uses the following language: "To have and to hold * * * unto the said

Richard Evers Lee, his executors, administrators and assigns * * * for and during the term of ninety-nine years, and after that time renewable for a further term of ninety-nine years, and so on forever." Then follow certain covenants and stipulations to be performed by the said Lee, for himself, his executors, administrators and assigns. The renewal lease which is made, not to the *heirs* of Caroline Fleming Hare, but to her *executors,* uses almost identically the same language. With the greatest deference and respect, it is earnestly urged that the Supreme Court of Appeals of Virginia disregarded the true relation between the parties, when in its opinion rendered in this case, referring to the lessees, it said: "They can assign or *devise* the same, and their *heirs* (italics ours) will take in case there is no assignee or *devisee.*" We cannot help but feel that the court with the original and renewal lease before it, coupled with the further fact that the renewal was made by the city of Norfolk, with the approval of the city attorney, its legal advisor, to the *executors* of Caroline Fleming Hare, and not to her *heirs* or *devisees,* has misconceived the true relation between the parties as well as the uniform construction placed thereon by said parties.

Nor has the city of Norfolk ever admitted the limited estate in said property which the Court of Appeals has attempted to invest it with.

On November 2, 1816, the council of the Borough of Norfolk, realizing that it had only leased the lots in question, adopted an ordinance authorizing the sale of the fee in said Town Point Land. Said ordinance provided as follows:

> "An Ordinance Authorizing the Sale of Certain Lands Belonging to the Borough of Norfolk (Passed Nov. 2, 1816).
>
> "Whereas, it is represented that many of the lessees of the land belonging to the Borough of Norfolk, formerly known by the name of the Fort Land, and now by the name of the Town Point Lands, are de-

sirous of extinguishing the rents payable thereon to the Borough of Norfolk, and it is believed that such a measure, and the consequent change of their titles into a fee simple instead of a leasehold tenure, would be beneficial to the tenants and not injurious to the interests of the Borough of Norfolk:

"I. *Be it therefore ordained and enacted,* That the President and Vice-President of the Hall, on the part of the Common Council, with the Recorder of the Borough of Norfolk, be authorized and empowered to make such contracts, with the lessees, or any of them, or other persons, as to them shall appear judicious, for the sale and release of all the rights of the corporation, in and to the rents payable to the said Borough, on all or any of the lands aforesaid, and for the sale and release of the right and title of the corporation in and to the said lands, or any part thereof, or of their reversionary interest therein; and on the payment or security for the due payment of the consideration agreed on, then that the Mayor of the said Borough, make and execute proper and legal deeds and conveyances for confirming and carrying into effect the contract so made by the Commissioners. *Provided, however,* that the said commissioners shall not have power to sell or dispose of the interest of the corporation in the lots designated in the plan of the said Town Point Lots, by the numbers 9, 10 and 18, and the lot on which stands the public warehouse, or any part thereof.

"II. This Ordinance shall commence and be in force from and after the passing thereof."

Ordinances of the Borough of Norfolk, 1820, page 221.

This is strongly conclusive of the view the duly authorized agents of the city of Norfolk had of the character of the relation existing between it and the lessees of the said land. They recognized the fee as remaining in said city and recognized that said fee had a considerable monetary value; that the ownership of the said land was not vested in the lessees, and could only become so vested in pursuance of

the plan outlined in said ordinance, namely, by purchase at a price to be agreed upon; in other words, by making a new contract. While the authority conferred by said ordinance was never exercised, its avowed purpose upholds our contention.

In March, 1872, the council of the city of Norfolk passed an ordinance providing for the issue of $250,000.00 of eight per cent bonds. Section 3 of said ordinance provides as follows:

> "SEC. 3. Full power and authority are hereby given to the said committees, by one or more good and sufficient deed or deeds, as they may deem expedient, to convey in whole or in part, that is to say, any part or parcel thereof, by one deed, any other parts or parcels thereof by other deed or deeds, the following property of the said city, to wit, seven hundred and thirty-five shares of the stock of the Raleigh and Gaston Railroad Company, five hundred and fifty shares of guaranteed stock of the Norfolk and Petersburg Railroad Company, five thousand shares of the stock of the Atlantic, Mississippi and Ohio Railroad Company, the tobacco warehouse and wharf thereto attached, situated on Water street in the said city, *the Town Point property of the said city*, the wharf property at the end of Nebraska street in the said city (the said real estate to be conveyed subject to any existing lease thereof), together with the rents, issues, dividends and profits of all the said property, and all the revenues collected or to be collected from time to time from the markets of the said city, in trust, to secure the payment of the said bonds and coupons, the property embraced by each deed to be conveyed in trust to secure the payment only and exclusively, of the bond and coupons in such deed named and mentioned."
>
> Ordinances of the City of Norfolk, 1885, page 53.

It will thus be again seen that the city continued to recognize its ownership of the fee in this property; that it had

a large monetary value, and that the city did not hesitate to avail itself of the same when it became necessary to borrow money on the faith thereof. It is only when resort is had to the imposition of a burden on the lessees for the city's own benefit that the assertion is made that the beneficial ownership of this property lies solely in the lessees.

The decisions of other States are well-nigh unanimous in holding that deeds similar to those in the present case are deeds of lease and create only the relation of landlord and tenant.

Allender *vs.* Sussan, 33 Md., 11; 3 Am. Rep., 171.
Williams *vs.* Holmes, 9 Md., 281.

In State *vs.* Mississippi Bridge Co., 134 Mo., 321; 35 S. W., 592, it was held that a lease in perpetuity containing a clause of defeasance in case of the failure of the lessee to comply with its terms, did not constitute the lessee the owner for the purpose of taxation. As the court very aptly said:

> "Where the defendants, by their own showing, have placed and left the title to the property, the court will leave it, for the purpose of assessment, levy and collection of taxes."

A similar doctrine is laid down in Chicago Railroad Co. *vs.* People, 153 Ill., 409; 38 N. E., 1075.

In Wilgus *vs.* Commonwealth (Ky.), 9 Bush, 556, it was held that a lease for ninety-nine years is personalty and not real estate; that it is inferior to an estate for life or an inheritance, and that it cannot be taxed as realty. This case also discusses the difference between estates for life and for years, so far as the obligation of the tenant to pay taxes is concerned.

Taylor *vs.* Taylor, 47 Md., 295, likewise holds that a lease for ninety-nine years, renewable forever, passes to the executor as personal assets of the deceased by reason of the

relation of landlord and tenant existing between the owner of the land and the holder of the leasehold.

Eminent Federal authority is found in the opinion of Chief Judge Cranch in Thruston *vs.* Mustin, Fed. Cases No. 14013, where, in discussing a tenancy for ninety-nine years, renewable forever, with leave to purchase the reversion at a stipulated price, he says:

> "But it is said that in such a lease, renewable forever, and with a right to purchase the reversion, the relation of landlord and tenant does not exist, inasmuch as it is in the power of the defendant to prevent the plaintiff and his heirs from ever enjoying the reversion, but until the defendant has actually purchased the reversion it remains in the plaintiff, and the relation of landlord and tenant still subsists in full force."

In Goodwin *vs.* Goodwin, 33 Conn., 314, it was held that an estate in land for the term of nine hundred and ninety-nine years, subject to the payment of annual rent, is personal property, and the widow of the tenant cannot claim dower out of it. The court, in discussing that phase of the question, uses this significant language:

> "The general principle is, that an estate for years is less than a freehold, and is nothing more than a chattel real, and is classed as personal property. 1 Swift Dig., 87, 167. Does a long term of years stand upon different ground in this respect from a short one? Of course the value of the reversionary interest depends upon the length of time the estate for years is to continue, and such value in the present case is exceedingly small—too small for any substantial benefit; but does the difference in the value of reversionary interests make any difference in principle?
>
> "If this estate had been created nine hundred and ninety years ago, it would be conceded that Horace Goodwin would have had only a chattel interest. If then at the commencement it is to be regarded as a

> fee simple, at what time will it change to a chattel real? The claim of the plaintiff involves the necessity of fixing a time, and the absurdity of holding that immediately before the time shall arrive the estate will be a fee simple, and immediately after a chattel interest merely. We are unable to discover any difference in principle in this class of estates whether they are to endure for a short or a long period of time, and we are satisfied that no distinction can be found in the common law."

In Moss Point Lumber Co. *vs.* Board of Supervisors (Miss.), 42 So., at page 298, the court says:

> "The length of time for which a lease is to run never can change the principle which governs the kind and character of the estate conveyed. If an estate be made to endure for one thousand years it is none the less an estate for years, and none the less controlled by the principles which govern the class of estate to which it belongs."

Gay, Adm'r, 5 Mass., 419, was also a lease for nine hundred and ninety-nine years, and it was held that the lease was not land, but personal property.

In Ware *vs.* Washington, 6 Smedes & M., 741, the court says:

> "The lease for ninety-nine years is but a chattel title. The dower is a freehold estate which never can be carved out of an estate for years. A lease for any definite period is a lease for years. A lease for one year and a lease for ninety-nine years create an estate of the same dignity."

In Dillingham *vs.* Jenkins, 7 Smedes & M., 479, the court says:

> "A lease for ninety-nine years is of no higher dignity than a lease for a term of one year."

The opinion in Moss Point Lumber Co. *vs.* Board of Supervisors, *supra,* after discussing numerous cases, including some of those above cited, concludes:

> "We might go on and multiply authorities without limit, holding that when a lease is the thing granted, it matters not whether it be for one year or for ninety-nine years, it belongs to the same class, and is controlled by the same principles as the law governing all other estates for years, however long or short they may be, conclusively showing that any idea that a lease for a long period of years carries with it any part of the fee is in opposition to all authorities on the subject."

And so it has been held that a lease with option to purchase does not constitute a sale or change the relation of landlord and tenant until the tenant has elected to purchase, and pays, or tenders, the purchase money.

Sweezy *vs.* Jones, 65 Ia., 272; 21 N. W., 603;
Brass *vs.* Sheffield, 49 Mass., 732; 33 Am. St. Rep., 386.

On this point the case of James *vs.* Kibler, 94 Va., 173, decided by the Virginia court, is almost identical with the present case. It will be understood that in the present case the court rests its conclusion of substantial ownership upon the circumstance that the lease in question is for ninety-nine years, with the option in the lessees to renew the same for an additional term of ninety-nine years, and so on forever. In James *vs.* Kibler the term was for five years, with the option to the lessee to renew the same for an additional five years, but it was held in that case that such option unexercised did not enlarge the original term of five years, and the court, at page 173, used the following language, which we feel is equally applicable to the present case:

> "The demise is for a specified period of five years, followed by this provision, which is relied on by the defendant to support his position: 'If at the expira-

tion of the said term of five years the said parties of the second part shall desire to retain the said lot and storehouse, with the appurtenances thereunto belonging for five years next after the expiration of the said term of five years, the said parties of the second part shall have the power and right so to retain same on the terms, stipulations and covenants herein expressed touching the term of five years next ensuing the date hereof, provided six months' notice in writing is given by said lessees to said lessors of such intention and desire.'

"This clause is in the form usually employed in lease contracts, where the lessee desires to secure the privilege of a second term. It is not a present demise of the premises for ten years, but an option to renew the lease, a mere covenant or undertaking to let the lessee have an additional term of five years upon the condition that he signify his election by six months' notice in writing. The very statement of the contract shows that there was a lease for only five years, with a right to the lessee to have another lease at the end of that time if he desired it, upon condition that he give the notice. A mere covenant to renew a term at the option of the lessee is not an actual renting for a longer period than the term specified. Gear on Landlord and Tenant, secs. 10-27; Hunter *vs.* Silvus, 15 Ill., 174; Sutherland *vs.* Goodnow, 108 Ill., 528."

If the demise for five years, with the option to the lessee to renew for an additional term of five years constitutes the relation of landlord and tenant for the term of five years only, and a demise for ninety-nine years with a like option to renew creates substantial fee-simple ownership in the grantee, it would be interesting to determine what number of years between five and ninety-nine marks the dividing line between these two consequences. The lessees of this property today are in identically the same situation as the lessee in the Kibler case, the only difference being in the number of years constituting their respective terms. It does not at all follow that the present lessees will exercise their option to

renew, and if they do, it necessitates the making of a new lease, which, as the record shows, was done at the expiration of the original term.

The renewal lease constitutes a new contract, which may or may not exist according to the exercise of the option of the lessee. Phelps *vs.* New York, 61 Hun. (N. Y.), 521.

Applying the above authorities, and with a full appreciation of the reason upon which they are based, it is confidently believed that this court in the exercise of its independent judgment will not feel constrained to accept the conclusion of the Virginia Court of Appeals in finding against the contention of the plaintiffs in error that the relation between the parties is purely that of landlord and tenant.

The case of Wells *vs.* Savannah, 181 U. S., 531, has been cited as determinative of the question now before this court, but the dissimilarity between the facts in that case and those in the present case, is at once apparent. There the city of Savannah sold the land in question outright, for an agreed, fixed purchase price, giving the option to the purchaser in the event he did not desire to pay the purchase money, to pay the interest on the same until the principal was paid. The city sold its fee-simple title, and the purchaser could discharge his obligation for the purchase price and terminate the payment of interest on the same at any time he was so disposed. The court said:

> "Possession of real estate attended with an indefeasible right to occupy in perpetuity, and *also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money,* will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented with these rights, continues, he is not a mere lessee, but a purchaser admitted into possession on the faith of his contract to purchase. Such were the contracts involved in the present case, and under them the purchasers have the actual possession and use of the premises, with the right to hold for-

> ever, on condition of paying up the purchase money whenever they please, and until that time an annual ground rent due by quarterly instalments, the amount of which is fixed by contract, and *is the equivalent of interest at a moderate rate per annum on the unpaid purchase money.* In all essential respects, so far as liability for taxes is concerned, these *purchasers* are in the position of ordinary purchasers in possession under a bond for title, and these last are chargeable with accruing taxes on lands so held." (Italics ours.)

The plaintiffs in error in this case have no "indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money." On the contrary, the city of Norfolk, as it had a right to do, mortgaged the fee to secure its own obligation; and it has also, as heretofore shown, passed an ordinance authorizing the sale of the fee in this land. The authority, it is true, was never exercised, but it is indicative of the fact that the borough of Norfolk at that time did not regard the lessees as possessing an "indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money." The city of Norfolk is under no obligation to convey its fee to this land; there is no purchase price agreed upon, but, on the contrary, we find the unmistakable signs of a lease and nothing more.

IN THE ABSENCE OF CONTRACT STIPULATIONS TO THE CONTRARY, THE OBLIGATION RESTS UPON THE LESSOR TO PAY TAXES ON HIS INTEREST.

Assuming that the relation of landlord and tenant exists, the next point to be considered is the liability of the lessees for taxes. Where lands are held under a demise for a term of years all general taxes and assessments imposed

upon the lands, in the absence of a contract providing to the contrary, are to be paid by the lessor.

Taylor on Landlord and Tenant (4th ed.), sec. 341.
Wood on Landlord and Tenant (2d ed.), sec. 414.

The requirement that tenants for life are themselves bound to pay taxes upon the premises rests upon a principle separate and distinct from any to be found in the case of landlord and tenant.

Wilgus *vs.* Commonwealth, *supra.*

There is no legal obligation arising out of the relation of landlord and tenant compelling the tenant to pay taxes imposed upon the land of the landlord.

Betterson *vs.* Budd (Ark.), 65 Am. Dec., 442.
Wischelbaum *vs.* Curlett (Kan.), 27 Am. Rep., 204.

THE CONTRACT IN THIS CASE IMPOSES NO OBLIGATION ON THE LESSEE TO PAY THE CITY TAXES ON THE FEE-SIMPLE ESTATE BELONGING TO THE CITY OF NORFOLK.

The contract in this case, as evidenced both by the original lease and the renewal of the same, provides that the lessee "will pay, or cause to be paid, to the person or persons lawfully authorized to receive the same all *public taxes* which shall become due on said land." It must be evident that by limiting the term "taxes" by the use of the word "public" the parties intended to restrict the obligation to a certain class of taxes.

There is most respectable authority for the position that the expression "public taxes" refers to those imposed by the State and National Governments, and not to those imposed by a limited jurisdiction, such as a municipality.

Shoalwater *vs.* Armstrong, 9 Humph., 217.
Morgan *vs.* Cree, 46 Vt., 773; 14 Am. Rep., 640.

The court in the latter case, which was construing the term "public taxes" as used in the charter of a town, said:

> "In construing public charters at a time long after their date, reference should be had to the condition of things, and the circumstances existing, at and about the time of their date. In determining whether a town tax is a public tax within the meaning of the charter it is proper to consider how it was regarded in that respect at the period of time about the date of the charter, and whether it was then included in what was originally denominated public taxes."

The purpose of a written agreement is to evidence the terms upon which the minds of the parties to it met when they made it. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which accompanied its making, endeavor to ascertain what they intended to agree to do—upon what sense of meaning of the terms they used their minds actually met.

Pressed Steel Car Co. *vs.* Eastern Ry. Co., 121 Fed., 611.

We believe that this rule is applicable in the present case in determining what was meant by the term "public taxes." As will be seen from the record, the Town Point property consisted of a number of lots, a large portion of which were covered by water, which the borough of Norfolk immediately preceding the making of the original lease had purchased for the gross sum of 2,000 pounds sterling. Immediately upon the purchase it proceeded to lease out the same for terms of ninety-nine years, renewable forever. The aggregate of the annual rentals accruing from these leases amounted to 540 pounds sterling, or twenty-seven per cent of the purchase price of the fee.

The borough of Norfolk had never had authority to impose taxes on land and buildings at the time of the lease.

At the time the original lease was made there was no tax of any description upon the property. On the 28th day of December, 1790, the General Assembly passed an act entitled "An Act Concerning Taxes for the Year 1790" (State taxes), of which the following is section 2:

> "No taxes shall be collected on lands, houses, or other property belonging to this Commonwealth, or to any county, town, college, or house for divine worship."
>
> 13 Henning's Statutes at Large, page 112.

On the 7th day of December, 1791, an act was adopted continuing for that year the tax law for 1790, as to State taxes, and providing that like property should be exempted from the payment of taxes as was exempted by the said recited act (act of December 28, 1790, *supra*).

13 Henning's Satutes at Large, page 241.

The act of December 3, 1792, repeats the exact words of exemption as to taxes for 1792, which the act of December 28, 1790 had used with reference to exemption from taxes for that year.

13 Henning's Statutes at Large, p. 336.

And so on for the subsequent years up to and beyond the time of the making of the original lease.

The above quotations all refer to State taxes. Such a thing as county or town taxes on land of any sort was not known at that time. The authority of cities and towns extended only to taxes "by the poll on tithable persons." The whole system of taxation by counties and towns was, at the time of the original lease, based on the assessment by the poll, that is, on the head of inhabitants or freeholders who were tithable. There had been at one time a State tax on lands, although there was none at the time on land belong-

ing to counties or towns, but there might be again, and the covenant was doubtless inserted to protect the lessor against the possible reimposition of this.

A municipal tax on real estate at the time of the original lease was unheard of, unknown, had never theretofore been in existence, and therefore could not have been in contemplation of the parties, and there was no occasion at that time to contemplate the occurrence of such an event.

At the time the lease in question was made the property, as we have shown, was exempt from city taxes, which exemption the court, in Black *vs.* Sherwood, 84 Va., 906, said was "in accord with the ancient usage of the Commonwealth." To hold that the covenant imposed upon the lessees liability for city taxes would be to find that the contracting parties, in making their contract, contemplated something which, according to the usage of the Commonwealth, had never before been in existence.

In the case of Love *vs.* Howard, 6 R. I., 116, the lessee covenanted to pay "all taxes and assessments that may at any time during said term be assessed upon said lot or its appurtenances." There was an assessment made of a character different from any that had theretofore existed at the time of the making of the lease, and the court very properly held that the lessee only obligated himself by the covenant in question to pay such taxes and assessments as could have been contemplated by the parties, and not those of a description that were not then and had never been in existence. Construing the covenants in the present case in the light of this rule of construction, the claim of the city must fail.

See also Woodruff *vs.* Oswego Starch Co. (N. Y), 68 N. E., 994, where it is held that the law in effect at the time of the execution of the lease defines the extent of the lessee's obligation by reason of the covenants to pay the taxes.

In Brown *vs.* Wagner, 1 Pears (Pa.), 254, the lease was made after the law became effective, and consequently was

governed by the provisions of the existing law, but the court intimates very strongly that had the conditions been reversed its decision would have been otherwise than it was.

In Bolling *vs.* Stokes, 2 Leigh (Va.), 178, there was a covenant by the lessee to pay "all taxes and other public dues in any manner accruing," etc. The court, while conceding that the terms were very strong, said:

> "But they may be satisfied by the application of them to the *ordinary* and *usual* taxes and public dues. *To extend them to an expense unknown by the parties,* incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest, *would be to disregard all the circumstances under which the contract was made.*" (Italics ours.)

See also:

Davenant *vs.* Salisbury, 1 Vert., 223.
Devonshire *vs.* Barrow Hæmatite Steel Co., 46 L. J., Q. B. D., 435.
Same case affirmed, 2 Q. B. D., 286.
Second Univ. Soc. *vs.* Providence, 6 R. I., 235.

The Supreme Court of Appeals in its opinion has failed to discriminate between a tax which was not in contemplation by contracting parties and a simple failure to exercise the taxing power on the part of the instrumentality of government vested with the same. To make our position clear, no taxpayer has a vested right in the failure of the taxing power to exercise its functions, nor do we make such a contention. We do, however, contend that the city of Norfolk, as the owner of the fee in the property in question, is primarily liable for all taxes and public impositions upon the same, and that the only liability upon the plaintiffs in error in this case grows out of the contract of the lessees, their predecessors in title, to pay the public taxes, and in determining this the court must have regard to the surrounding circumstances existing at the time this covenant was made,

when there was no such thing known as city taxes on real estate of any description.

THE CITY OF NORFOLK IS ASSESSING ITSELF ON ITS OWN PROPERTY AND ENDEAVORING TO MAKE THE LESSEES PAY THE SAME.

The assessment of the land in question is to the city of Norfolk as the fee-simple owner thereof. The tax bill is made out in favor of the city of Norfolk as the taxing power against the city of Norfolk as the taxpayer. In answer to the very obvious objection to such a proceeding, counsel for the city attempt to reply with the statement that the lessees are the real beneficial owners, and are consequently properly chargeable with the taxes on the said land. Our answer to this position is that if the lessees are the beneficial owners they and not the city should be assessed with these taxes, but assessed only, however, to the extent of their beneficial estate, namely, a leasehold.

Trammel *vs.* Faught 74 Tex., 557; 12 S. W., 317.

A covenant in a lease to pay taxes is simply an agreement binding as between landlord and tenant. The landlord cannot absolve himself from the obligation to pay taxes, so far as the taxing power is concerned, by vouching a covenant of this kind. The taxing power disregards this covenant in the lease and proceeds directly against the fee-simple owner. The lessor is primarily liable and his obligation is never discharged until the tax is paid and the obligation canceled. As is said in 2 Cooley on Taxation, 822:

> "The lessee's assumption of the payment of taxes and assessments does not relieve the lessor from his liability for them, to the State or municipality, nor does it enable the taxing authority to secure a personal judgment against the lessee."

Citing:

Yazoo & M. V. R. Co. *vs.* Adams, 76 Miss., 545.
Miles *vs.* Del. & H. Canal Co., 140 Pa. St., 623.
Haylett *vs.* McCutcheon, 158 Pa. St., 539.
Chicago, R. I. & P. R. Co. *vs.* Ottumwa, 112 Ia., 300.

It will thus be seen that the city cannot escape the weakness of its position by vouching the liability of the lessee to pay the taxes by reason of the covenant in question. The lessees have obligated themselves to pay only the valid public taxes, not those that are dependent upon such an illegal fallacy for their validity. In other words, the taxing power looks to the owner of the property. If the contention of the city is correct, we would have the city of Norfolk as the taxing power assessing the city of Norfolk as the owner of the land; paying the taxes out of its own treasury to its own collector, who, after deducting the commissions allowed him by law, would at once replace the amount, less the commissions and expenses deducted, where it was before the payment of the same. If, for any reason, the taxes were not paid, we would have the further anomaly of the city of Norfolk proceeding against itself, either by distress or by sale of the property for the collection of its own taxes, plus such additional penalties, interest and charges as naturally accrue under such circumstances, and, if the same method were followed in that proceeding as is now followed in the case of other tax sales, we would further witness the anomaly of the city purchasing the property at said sale, and ultimately having a tax-title deed conveying for the second time the property to itself when at no time had it ever been deprived of the title.

The city cannot avoid this absurd position by the statement that the lessees have obligated themselves to pay this tax, for that obligation only exists so long as the lease is in existence, and upon the termination of said lease the city of Norfolk would reassume possession of the property, with-

out obligation on the part of the lessee or any one other than itself to pay these taxes. The validity of this tax must stand or fall independent of the existence or non-existence of the lease. The tax to be a valid one must be valid at any and all times, and unless it is a valid one there is no liability on the lessees.

It hardly needs the citation of authorities to sustain the proposition that in all the important legal relations of life there must be two parties.

This is well summed up in Clark on Contracts, page 9, in discussing contractual relations:

> "From the very nature of things, two persons are necessary. There may be more than two, but there cannot be less. A man cannot be under a legal obligation to himself, or even to himself in conjunction with others. He may owe a natural or moral duty to himself, but a duty is not an obligation unless it is enforceable at law. A man cannot sue himself, and therefore cannot be under an obligation in law to himself. It follows, then, that a man cannot enter into a contract with himself, or even with himself and others. In an English case, where a man had borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. 'The covenant, to my mind, is senseless,' said Pollock, C. B. 'I do not know what is meant, in point of law, by a man paying himself.' And in a Massachusetts case it was said that 'It is a first principle that, in whatever different capacities a person may act, he never can contract with himself nor maintain an action against himself. He can in no form be both obligor and obligee.' "

> "No one can be both plaintiff and defendant in the same action. A party cannot have a right of action against himself as debtor or tortfeasor, nor contract with himself, nor maintain an action against himself, in whatever different capacities he may act."
>
> Byrne *vs.* Byrne, 94 Cal., 576.

To the same effect are the following cases:

Mahan *vs.* Sherman, 7 Blackf. (Ind.), 378.
Portland Bank *vs.* Hyde, 11 Me., 196.
Grahame *vs.* Harris, 5 Gill & J. (Md.), 489.
Warren *vs.* Stearns, 19 Pick (Mass.), 73.
Eastman *vs.* Wright, 6 Pick. (Mass.), 316.
Wilson *vs.* Benedict, 90 Mo., 208.
Blaisdell *vs.* Ladd, 14 N. H., 129.
Pearson *vs.* Nesbit, 1 Dev. L. (N. C.), 315; 17 Am. Dec., 569.
Newsom *vs.* Newsom, 4 Ired. L. (N. C.), 381.
Westcott *vs.* Price, Wright (Ohio), 220.
Livingston *vs.* Livingston, 2 Mill (S. C.), 428.
Corrigan Transit Co. *vs.* The Majestic, 73 Fed. Rep., 499.
Bosanquet *vs.* Wray, 6 Taunt., 597; 1 E. C. L., 495.

The same rule, which, we believe, applies with much greater force in the case of taxation, is amply sustained by a most respectable array of authorities, in which it is uniformly held that when the taxing power and the taxpayer are one and the same, the tax sought to be imposed is absolutely void and illegal.

In Galveston Wharf Co. *vs.* City of Galveston, 63 Tex., 14, after a full discussion of this question, the court says:

> "In other words, can the city tax the property to the extent of its beneficial interest therein, when to do so will diminish its revenue, and in addition to this, incur the increased expense of collecting the taxes.
>
> "In our opinion, it might as well tax any other property it owns and pay the taxes out of its own treasury with a loss to itself of the cost of collecting * * * The power to tax under such circumstances involves the power of a municipal corporation to tax itself or its own property, which it certainly cannot do for obvious reasons."

In Lowe *vs.* Lewis, 46 Cal., 549, which involved a tax title arising out of the attempt of a city to assess and tax its own property, the court said:

> "When the lot was sold for taxes it was the property of the city and county of San Francisco, and it appears from the recitals of the deed that it was sold for taxes due to the State of California and to the county of San Francisco. The property of a municipal corporation is not liable to taxation for municipal purposes. It cannot tax its own property (Fall *vs.* Marysville, 19 Cal., 391). The tax for which the lot was sold being *illegal and void*, the sale was a nullity, and the tax deed conveyed no title (Hardenburg *vs.* Kidd, 10 Cal., 402; Bucknall *vs.* Story, 36 *Id.*, 67)."

It is said in the case of City of New Orleans *vs.* Commissioners of McDonough's Estate, 12 La. Ann., 240:

> "It is plain that, so far as the city of New Orleans is concerned, it would be an idle ceremony for the city to tax itself. Such a claim would be instantly extinguished by confusion."

In the opinion in Penick *vs.* Foster (Ga.), 58 S. E., 773; 12 L. R. A. (N. S.), page 1163, the court quotes with approval the following from Am. & Eng. Enc. Law (2 Ed.), page 367 *et seq:*

> "It is well settled, as a general rule, that public property and the various instrumentalities of government, whether, in England and her colonies, appertaining to the crown, or, in the United States, to the Federal Government, the various States, or the political subdivisions of the States are not subject to taxation. This immunity is, in almost all jurisdictions, confirmed by some express constitutional or statutory grant or exemption; but it is by no means dependent thereon, for it rests upon the most fundamental principles of government, being necessary in order that the functions of government be not unduly impeded and that the Government be not forced into

> the inconsistency of taxing itself in order to raise money to pay over to itself, which money could be raised only by other taxation; and the express exemptions are considered to be inserted in the tax laws only from abundant caution, and because the assessment of taxes is made by local officers, who, though skilled in the valuation of property, are presumably unlearned in legal distinctions."

If, then, the well founded reasoning of these cases is recognized by this court, what construction should be placed upon the lessees' covenant to pay taxes? We assert that the covenant should not be construed so as to apply to the payment of these city taxes on the fee-simple estate, which are void and unenforceable against the landlord, the city of Norfolk.

In the opinion in Clark *vs.* Coolidge, 8 Kan., at page 195, in discussing the scope of a covenant to pay taxes, the court says:

> "If said assessment were void, Clarke (the lessee) was certainly not liable to pay the assessment against said lot. It will certainly not be claimed that when Clarke leased the lot he agreed to pay any assessment except such as was valid, or such as could be legally enforced against Coolidge or against the lot itself. And if the assessment was void, why not allow Clarke to show it and have the benefit of that fact? Here is where we think the court erred. It is a general rule of both law and equity that a party may always appeal and rely upon the truth of any transaction in the determination of his rights, unless he would be committing a fraud upon the rights of the adverse party by doing so."

This opinion was rendered when Mr. Justice Brewer, formerly of this court, was a member of the Kansas court, though he did not sit at the hearing of that case.

In Scott *vs.* Society of Russian Israelites, 59 Neb., 571; 81 N. W., 624, it is said:

> "Finally, it is claimed that the defendant, having stipulated in the lease to pay the taxes on the prop-

erty, is thereby estopped from urging their invalidity. This argument is fallacious. The society, by the provisions of the lease, was not precluded from urging the invalidity of any taxes that should be assessed against the property. Its obligation was to pay the legal taxes, and no more."

In Herriott *vs.* Potter (Ia.), 89 N. W., page 92, it is said:

> "A tax that cannot be exacted by any remedy is no tax at all. Any obligation which cannot be enforced is simply a moral, not a legal, obligation. A lien which cannot be made effective is no burden to property."

In Soulard *vs.* Peck, 49 Mo., at page 478, in discussing a covenant of this kind, the court says:

> "But it must be conceded and assumed that defendant's obligation extended only to the repayment of legal charges or assessments."

The recent work of Underhill on the Law of Landlord and Tenant fully discusses this question, citing numerous authorities and giving the reasons upon which they are based. In volume 2, section 605, the author says:

> "The lessee's covenant to pay the taxes is fulfilled by their payment by him in any manner which prevents them from becoming a burden on the lessor's property or a personal liability upon him."

And in section 606 he says:

> "A covenant by a tenant to pay all taxes and assessments which may be levied means all taxes and assessments only as are valid and *which may be legally enforced against the lessor.*"

Can the taxes sought to be collected in this case from the lessees by virtue of the covenant be legally enforced against the city of Norfolk, the lessor?

The reason of the rule is well explained in section 607, as follows:

> "607. *The exemption of the premises from taxation.*—Where a lessee covenants to pay the taxes which may be levied or which may become due upon the premises during his term and it happens that by statute or otherwise the property leased is exempted from liability to a tax which otherwise the tenant would have to pay, he and not the landlord is entitled to the benefit of the exemption. The payment of the taxes for the lessor under a covenant of this sort constitutes in reality merely a payment of the rent. As between the lessee and the lessor it is not material whether the former pays a certain stipulated sum for rent direct to the lessor out of which the latter will discharge his taxes or whether the lessee pays a smaller sum to the lessor and himself pays the taxes. The result to the lessee is always the same. But if the lessor's premises are exempt from taxes the lessee need not pay the taxes to the lessor, as the reason for his paying them, which was to exempt the lessor from their burden, has ceased. So, where a person leased certain premises from a city with a covenant on his part to pay the taxes and assessments levied, or charged on the premises, he need not pay taxes upon the city's reversionary interest which is by statute exempt from taxation."

In the opinion in Phila., W. & B. R. Co. *vs.* Appeal Tax Court, 50 Md., 397, cited with approval by this court in Jetton *vs.* University of the South, 208 U. S., 489; 52 L., 584, the Maryland court, in discussing the covenant of a lease to "pay all taxes, assessments and public duties then levied, charged or assessed, or that may hereafter be levied, charged or assessed on the above-described premises, or the yearly rent issuing therefrom," says:

> "This is the covenant in the lease from the city, but it is very manifest that it is but the usual covenant inserted in leases for the benefit and exoneration of the lessor, and that it has reference only to

such taxes and assessments as might affect the reversion, and its incident, the rent reserved under the lease."

Such is our contention in this case. Our position in regard to the true construction of the lease in question and the covenant of the lessees to pay the public taxes is sustained on principle in other branches of the law than that of landlord and tenant.

It has been the uniform policy of the law to hold that covenants as to encumbrances in deeds of conveyance apply only to those existing in third persons, which may defeat the estate granted by the covenantor. They are weapons of defense, and never engines of oppression, as between the parties. This is well illustrated by the following citations:

Horrigan *vs.* Rice, 39 Minn., 49; 38 N. W., 765, says:

> "Where, at the time of the conveyance, the purchaser has in himself the valid title to the premises, he cannot sue on the covenants it contains, for they only extend to a title existing in a third person which may defeat the estate granted by the covenantor. They do not embrace a title already vested in the covenantee. 'It can never be permitted to a person to accept a deed with covenants of seizin, and then turn around upon his grantor, and allege that his covenant is broken for that, at the time he accepted the deed, he himself was seized of the premises.' Fitch *vs.* Baldwin, 17 Johns, 161; Beebe *vs.* Swartwout, 3 Gilman, 179; Furness *vs.* Williams, 11 Ill., 229; Rawle, Cov., sec. 268; Bigelow, Estop., 346."

Bigelow on Estoppel, 293, says:

> "But a person will not be permitted to accept a deed with covenants of seizin, and then turn around upon his grantor and allege that his covenants are broken by reason of the fact that he himself, at the time he accepted the deed, was seized of the premises."

Applying this principle to the present case, a covenant by the lessees to pay taxes means no more and no less than that the lessees will stand between the city of Norfolk, the owner of the fee, and any taxing power that may seek to subject its property to taxation. It is a covenant of exoneration, and not a promise to pay to the lessor any additional stipulation over and above the stipulated rent.

This principle is likewise well borne out in the law of principal and surety, which this court has had recent occasion to apply in Hardaway *vs.* National Surety Co., 211 U. S., 552, where it was held that in the absence of liability against the principal there can be none against the surety, Mr. Justice Day, in his opinion, saying:

> "As the claim of Hardaway and Prowell, set up in this case, must be worked out against the surety because of the liability of the principal in the bond to them, and as there is no such liability either from Willard and Cornwell or Coyne to them, there can be no recovery against the surety on the bond."

This ruling is in accordance with the opinion of Mr. Justice Nelson in United States *vs.* Burbank, 4 Wall., 186, where he says:

> "It is unnecessary to refer to authorities to show that the liability of the surety cannot exceed that of his principal."

If we have applied correct principles of law in construing the contract in question, the conclusion is therefore irresistible:

First. That the relation between the city of Norfolk and the plaintiffs in error is that of landlord and tenant;

Second. That in the absence of a covenant to pay taxes, the landlord is chargeable with the same;

Third. That in the covenant of the lease to pay the "public taxes" the lessees are obligated simply to discharge

any taxes levied by any taxing power other than the city of Norfolk upon its interest in the property in question;

Fourth. That the city of Norfolk, acting in pursuance of legislative authority, is seeking to impose additional burdens upon the lessees through the medium of taxes upon its own property, which it contends that the lessees must pay. Its action thereby impairs the obligation of the contract as much as if it had endeavored to increase the stipulated rent covenanted by the lessees to be paid as consideration for the lease.

THE PARTIES BEAR THE SAME RELATION WITH REFERENCE TO THE IMPROVEMENTS.

The lease is silent on the subject of the title to improvements, and consequently the law bearing on this phase of the question is the general rule that permanent improvements placed upon the land at once become part and parcel thereof, and that the ownership of the same is identical with that of the land itself for all purposes, including taxation.

In the case of Kutter *vs.* Smith, 2 Wall., 491; 17 L., 830, Mr. Justice Miller said:

> "There was in the contract of lease between Link and Sherman a covenant that, at the expiration of ten years from the first day of May, 1859, it should be at the election of the lessor to purchase the buildings erected on the leased premises at their appraised value at that time, or renew the lease of said premises for the term of ten years longer, at a rent to be appraised in like manner by disinterested persons; and this election on the part of the lessor was to be exercised at the expiration of every ten years for the period of ninety-nine years."

The lessee assigned his lease, and failed to pay the rent, for which reason the lessor took possession, and the lessee's assignee brought suit for the value of the building. As to this insistence, the court says:

> "It is argued that the plaintiff's assignor became the owner and had title or estate in the building as separated and distinguished from the land; and while the defendant had the right to enter, take possession, and hold for a failure to pay rent, that right was in some way subordinate to plaintiff's right to the house."

And again:

> "But we cannot concede that plaintiff or his assignor had, at any time, the legal title to the building as distinct from the lot. The well settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contracts. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event."

In Bass *vs.* Metropolitan Westside Ry., 82 Fed., 857, the question of the ownership of a building erected by the lessees was involved, and the court said:

> "* * * it is also stipulated that, at the end of the term, the owner of the fee shall purchase the building or extend the term of the lease. It is clear, upon the whole instrument, that in no event was the removal, from the premises, of the building, which the lessee undertook to erect and keep in repair, contemplated. On no conceivable contingency can there arise under the contract a right on the part of the lessee to remove the building, even were it a physical possibility to do so. In contemplation of law the building was intended to be, and accordingly, in the process of construction, it became a part of the realty."

And again:

> "Though in form the lessor is bound to purchase the building, the evident intention is simply that in one or the other mode prescribed, she shall make compensation for the erection of the structure and for keeping it in repair during the term of the lease."

In the case of Fraer *vs.* Washington, 125 Fed., 280, in which the same question was involved, the court said:

> "In the absence of an express provision in the lease severing the improvements from the realty and declaring that they should be and remain the property of the lessee, it may well be that they become a part of the freehold according to the general rule that one who erects a permanent structure on land makes it a part of the land."

In the case of People *vs.* Barker, 153 N. Y., 98; 47 N. E., 46, it was held that under a lease of piers in the city of New York, providing that the lessee during the term should erect on the piers a shed, which was to become the property of the lessor on the expiration of the lease, the shed erected in conformity therewith was the property of the city during the term and could not be assessed for taxes as the property of the lessee.

In Madigan *vs.* McCarthy, 108 Mass., 376; 11 Am. Rep., 371, the tenant at will had removed a substantially constructed house from another place to the land of which he was the tenant, and had put it upon a stone foundation, with a cellar under it, without the land owner's consent, or any contract that the tenant should hold it as his personal property, and the court held that it became a part of the realty and could not afterwards become personal property by the mere assent of the land owner, without an actual severance of it from the land.

In West Shore R. R. Co. *vs.* Wenner, 75 N. J. L., 494; 127 Am. St. Rep., 806, it was held that when a tenant erects a building upon land which he has leased that it thereupon

becomes a part of the freehold and the property of the landlord.

The theory of the Virginia tax assessment laws is that the ownership of the land is identical with that of the permanent improvements. This will be at once seen upon reference to sections 465 and 466 of the Code of Virginia (1904), which are as follows:

> "465. In the table of tracts of land the commissioner shall enter each tract separately, and set forth in as many columns as may be necessary the name of the person who by himself or his tenant has the freehold in possession, his place of residence, the nature of his estate, whether in fee or for life, the number of acres in the tract, the name of the tract, if it has a name, and a description of it with reference to contiguous tracts or to the water-courses, mountains, or other places on or near which it lies; the distance and bearing from the court-house; the value of the land per acre, including the buildings; the value of the lands and buildings; the sum included in the value on account of buildings; the amount of tax on the whole tract at the legal rate, and from whom, when, and how the owner derived the land when this is known, with a note and explanation of any alteration made showing why and upon what authority it was made. The land book shall be made out by magisterial districts, and the commissioner shall make therein a summary showing in each magisterial district the number of acres; the value of buildings thereon; the value of the land, including buildings; the tax assessed on such land and buildings for the support of the government and the tax assessed thereon for support of public schools; the total of these taxes; the levies assessed thereon for county free school purposes; the levies for district free school purposes; the total county and district levy for school purposes and the amount of levy for county purposes; and the said book shall also show the aggregate number of acres in the magisterial districts comprising said commissioner's district, the value of the buildings thereon; the value of land, including

buildings; the State tax for the support of government and the tax for support of schools and the aggregate of such taxes; the levies for county school purposes, the levies for district school purposes, and the total for these levies, and the levies for county purposes."

"466. What the table of town lots to contain.

"In the table of town lots he shall enter separately each lot, and shall set forth in as many separate columns as may be necessary the name of the person, his residence and estate as in the table of tracts of land. The commissioner shall set forth in other columns the number of each lot in the town, with the name of the town, if not previously placed in the caption or heading of the table; a description, where the person does not own the whole lot, of the part which he owns; the value of the buildings on the lot; the value of the lot, including buildings; the amount of tax at the legal rate, and like notice of the source of the title and explanation of alterations in the table of tracts of land; provided, however, that the commissioner of the revenue of Pulaski county, when assessing or listing for taxation the town lots in the town of Pulaski in said county, shall, in addition, set forth in other columns the number of each lot in the town and the number of the section or block in which it is located."

The only exception under the Virginia laws to the rule that the land and buildings must be assessed to one and the same person is in the case of mining and manufacturing establishments, which are governed by section 485, providing for separate assessments where the land is owned by one party and the machinery and fixtures by another. The necessity of adopting this latter section in favor of trade fixtures clearly indicates that the general rule is to be found in sections 465 and 466.

It may not be out of place at this juncture to anticipate a possible specious but unfounded objection to this contention. Our argument is directed solely to the impossibility of the city of Norfolk as the taxing power levying taxes upon

property of which it is itself the fee-simple owner, and requiring the lessees to pay the same. We contend that the fee-simple value of the lands and buildings cannot be taxed for city purposes, but we always have admitted the reasonableness and propriety, under legislative authority, of taxing upon a fair valuation the leasehold interest of the plaintiffs in error. This is no novel position to this court, and we feel that it is amply justified by the opinion in Jetton *vs.* University of the South, 208 U. S., 489; 52 L., 584, and following, where it was held that while the fee-simple interest of the University of the South in the land and buildings in question was exempt, the interest of the lessee in and to the said land and improvements was subject to taxation.

This was likewise the theory of the opinion in Phila., W. & B. R. Co. *vs.* Appeal Tax Court, 50 Md., 397.

THIS COURT CAN AND SHOULD PROTECT LESSEES' CONTRACT.

Assuming that we have correctly construed the terms of the contract existing between the city and the lessees, and that, as a consequence, the lessees are only liable for such taxes upon the city's interest in the lands and buildings as may be imposed by agencies other than the city of Norfolk itself, the next step in this discussion leads us to the investigation of the method whereby additional burdens, by way of city taxes on the city's interest, have been imposed by the city itself by virtue of legislative authority, and the same sought to be collected from the lessees in derogation of their contractual rights.

The lease contract is dated May 15, 1895, and the rights of the lessees under the contract must be determined as of that time.

By an act of the General Assembly of Virginia, approved March 14, 1906 (Acts of Assembly, 1906, page 254 *et seq.*), a new charter was granted the city of Norfolk. The author-

ity given the city by the legislature to impose taxes is found in section 40 of said charter as follows:

> "For the execution of its powers and duties the city council may raise annually, by taxes and assessments, in said city, such sums of money as it shall deem necessary to defray the expenses of the same, and in such manner as it shall deem expedient, in accordance with the Constitution and laws of this State and of the United States: provided, however, that it shall impose no tax on the bonds of said city."

In pursuance of this authority, the councils of the city of Norfolk, in April, 1906, adopted an ordinance entitled "An ordinance imposing taxes on property, persons and licenses for the payment of interest on the city debt and to meet the general appropriations for the year beginning July 1, 1906," which was approved by the Mayor of the city April 21, 1906. The said ordinance provides as follows:

> "1. Be it ordained by the common and select councils of the city of Norfolk that no person shall engage in any business in the said city of Norfolk, for which a license is required by the laws of the commonwealth, or the ordinances of said city, without first having applied for and obtained such license, under the penalty or penalties hereinafter provided, as a part of this ordinance; and that for the year beginning on the first day of February, 1906, and for each year thereafter, while this ordinance is in force, the taxes on lands and lots, persons, incomes, and other property for the support of the city government, the payment of interest upon the city debt, and for other municipal expenses, shall be as follows:
>
> *General Levy.*
>
> "2. On each male resident of the city who has attained the age of 21 years a poll tax of fifty cents shall be collected.
>
> "3. Upon all lands, wharves and lots, and the improvements thereon, ground rents and rent charges

> in the city, not exempt from taxation, there shall be a tax of one dollar and sixty-five cents ($1.65) for every one hundred dollars ($100) of the assessed value thereof, except in the seventh ward, where there shall be a tax of one dollar and seventy cents ($1.70) for every one hundred dollars ($100) of the assessed value thereof."

It will be noticed that there is no specific provision either in the section of the charter or in the ordinance in question, requiring or authorizing the imposition of taxes by the city of Norfolk upon property of which it is the fee-simple owner, but in the determination of the questions raised by the pleadings both in the lower court and in the Supreme Court of Appeals, application of the charter and ordinance was directly involved, and the Court of Appeals, in finding the lessees liable necessarily concluded that the provisions of the charter and tax ordinance were applicable to the property in question. The State court has therefore decided that the city in imposing the tax was doing so in pursuance of legislative authority. If, then, our construction of the contract is correct, the result is to impose upon the lessees by subsequent legislative enactment a burden which they have not assumed under the terms of their contract.

The repugnance of these legislative provisions to the Federal Constitution has been asserted from the very outset of this controversy. As heretofore shown, an impairment of the obligation of the lessees' contract by the acts in question is alleged in the bill of complaint. (See printed Record, page 13.)

The defendant, city of Norfolk, in its answer makes the following allegations:

> "Respondent made said assessment in direct compliance with the Constitution and the laws of the State of Virginia. * * *"

> "Respondent further says that said assessment and tax are legal; that they are not in contravention of any contract of complainants, or of any one through

whom they claim; and it denies that said taxes impair the obligation of any contract whatsoever." (Printed Record, page 24.)

Therefore the constitutionality of the tax laws above set out as applied to the lessees was directly in issue in the Circuit Court and also in the Supreme Court of Appeals.

In the opinion of the latter court (page 26, printed Record) will be found the following language:

> "Thereupon the appellees filed this bill for an injunction against the collection of these taxes by the city of Norfolk, upon the ground that they were illegal and in contravention of the contract under which they claim."

And in the same opinion (page 28 of the printed Record) the court concludes:

> "For these reasons we are of opinion that no right of the lessees under their lease contract has been violated by the tax imposed by the city of Norfolk, and therefore, the decree appealed from, enjoining the collection of such tax, is erroneous and must be reversed."

It will thus be seen that this entire controversy hinged upon the impairment of the lease contract by virtue of the charter and ordinances of the city of Norfolk, and that this contention was decided adverse to the claim of the lessees, who are here the plaintiffs in error.

Our position in this respect is fully sustained by the opinion of this court in Murray *vs.* Charleston, 96 U. S., 432, and following, and we particularly call the court's attention to this portion of the same:

> "But neither the charter itself, nor any subsequent acts of legislation, directly or expressly interfered with any debts due by the city, or gave to the city any power over them. They simply gave limited legislative power to the city council. It was not

until the ordinances were passed under the supposed authority of the legislative act that their provisions became the law of the State. It was only when the ordinances assessed a tax upon the city debt, and required a part of it to be withheld from the creditors, that it became the law of the State that such a withholding could be made. The validity of the authority given by the State, as well as the validity of the ordinances themselves, was necessarily before the Court of Common Pleas when this case was tried; and no judgment could have been given for the defendants without determining that the ordinances were laws of the State, not impairing the obligation of the contracts made by the city with the plaintiff. * * * It is plain, therefore, that both in the Common Pleas and in the Supreme Court of the State a Federal question was presented by the pleadings and was decided—decided in favor of the State legislation, and against a right the plaintiff claims he has under the Constitution of the United States. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the State legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation, this court is authorized to interfere. The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits 'where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and

> the decision is in favor of their validity.' * * * That involved in the judgment of the Court of Common Pleas and in that of the Supreme Court of the State was a decision that the city ordinances of Charleston were valid, that they did control the contract of the city with the plaintiff, and that they did not impair its obligation, is too plain for argument. * * * The court gave judgment for the defendant, which would have been impossible, had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction, therefore, is manifest."

This court, in the opinion of Mr. Justice Day, rendered in the recent case of Northern Pacific R. Co. *vs.* State of Minnesota, 208 U. S., 583-591, has well stated the law applicable to cases of this kind:

> "The legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the State court gives effect to subsequent State or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court."

Conclusion.

In the previous argument of the questions involved in this case opposing counsel have placed considerable reliance upon the opinion of this court rendered in People of the State of New York *ex rel.* Metropolitan St. Ry. Co. *vs.* State Board of Tax Commissioners, 199 U. S., 1; 50 L., 65. In our opinion, that case conclusively establishes the contention of the plaintiffs in error. The facts briefly were that by a law of the State of New York a tax was imposed upon the franchise rights of certain public service corporations, and it was held by this court that such a tax did not impair the obli-

gation of their contract, just as in this case if the city of Norfolk should attempt to tax the lessees on their leasehold interests it would have the same right to do so, assuming legislative authority to exist, as it would to tax any other species of property. In other words, the franchise rights of the railway companies in New York and the leasehold interest of the plaintiffs in error are property vested in them and subject to taxation.

But in that case the distinction we are endeavoring to make was fully recognized and upheld in distinguishing the case of Chicago *vs.* Sheldon, 9 Wall., 50.

In the latter case the city of Chicago required a certain amount of work from the street railway company as the consideration for its franchise, and after the franchise was granted and accepted it sought, through the means of a special assessment, to compel the railway company to pay for further work of a nature similar to that required by the original ordinance, which this court held was an attempt to exact an additional consideration for the rights granted, and, consequently, impaired the obligation of the railway company's franchise, the court saying:

> "It is claimed on the part of the railway company, that by the true construction of their contract, they are exempt from the assessment made upon their property, and the 7th section of the ordinance of the 23rd May, 1859, is referred to and relied on in support of this construction. That section prescribes the obligations and duties of the company in respect to the condition and repairs of the streets during the whole period of the running of the contract, and imposes certain burdens upon it as to repairs, from which, to their extent, the city, or adjoining owners of lots, are relieved. It is insisted that this provision was intended, and so understood by both parties, as regulating the whole subject as it respects improvements of the streets occupied by the company, and to fix in the contract the extent of their liability.
>
> "The language of it is somewhat peculiar, and it cannot well be denied but that a fair and reasonable

interpretation favors this view. It is as follows: 'The said company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition.' Now, it is quite clear that the above recitals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny, but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the company, namely: they should keep in good condition and repair eight or sixteen feet, as they used a single or double track, along the entire length of the road. They were not to grade, pave, macadamize, fill or plank even the above width or distance, except so far as such work came within the category of repairs."

We therefore feel confident in the belief that this court will likewise hold that the effort of the city of Norfolk by the means it has adopted to cause these lessees to pay, as an additional consideration for their leases, taxes for which (if they are valid at all) the city is primarily liable and which have never been assumed by the lessees is opposed to the provision of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts.

Respectfully submitted,

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NOVEMBER 15, 1910.

Office Supreme Court, U. S.
FILED.
NOV 29 1910
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 104.

WILLIAM H. WHITE, PLAINTIFF IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

WALTER H. TAYLOR,
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THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

Statement of Case.

The question involved in this case is the right of the city of Norfolk to tax the building on a certain lot in the city of Norfolk, the said lot being owned by the city of Norfolk, but under lease to the plaintiff in error for a period of ninety-nine years, renewable, at the option of the lessee, for a further period of ninety-nine years, and so on forever. The lessee erected the building in question. Under the terms of the lease the lessee was required to make improvements on the lot.

In the year 1905, William H. White, the plaintiff in error and assignee of the said ninety-nine year lease, filed in the

Circuit Court of the City of Norfolk a bill asking for an injunction to restrain the city of Norfolk from collecting city taxes, which the city had assessed, for the year 1903, on the said building. The Circuit Court awarded the injunction. The city of Norfolk appealed the case to the Supreme Court of Appeals of Virginia (the court of last resort), and that court dissolved the injunction and dismissed the bill, and from that decree this case comes on a writ of error before this court.

In the year 1792, the borough of Norfolk (now the city of Norfolk) purchased the property, then known as the Town Point property, for the sum of two thousand pounds, and immediately proceeded to plot the same into lots, and, in August of that year, at public auction, leased the lots separately, to the highest bidders, for a period of ninety-nine years, said leases being renewable at the option of the lessee, at the end of the ninety-nine years, for a further period of ninety-nine years, and so on forever.

As a result of the leasing by public auction in August, 1792, and of the re-leasing of several lots, which the original lessees failed to take, a few years thereafter the borough acquired an annual rental, under the leases, of 546£, 17s. and 6d., or *more than twenty-seven per cent.* on the purchase price paid by the borough for the property. This percentage represented a net profit to the city, as the lessees were required, under the terms of the leases, to pay the State taxes.

Among the lots so leased was lot No. 9, which was leased to one William Williams, and, by the terms of the lease, the said William Williams covenanted to pay an annual rental of 37£, 7s. and 6d., which, later, was recognized by both parties as amounting to $124.58. By the terms of the lease the said William Williams covenanted, within three years, to improve the said land, or tender a bond, with sufficient security, to secure the payment of the annual rent and taxes, until the improvements upon the property should be sufficient to secure the same (Record, p. 23).

The lease to William Williams expired on the 26th day of August, 1891, and, on the 19th day of September, 1890, the city of Norfolk, as the legal successor of the borough of Norfolk, and in anticipation of said expiration, executed a renewal lease to George H. Sargeant, trustee of Elizabeth F. Sargeant, who had, by mesne conveyances, become the owner of said lease, and, on the same day, the said George H. Sargeant, trustee, conveyed the said lease to William H. White, the plaintiff in error.

By the terms of the original lease, the lessee covenanted to pay, or cause to be paid, to the person or persons authorized to receive the same, the public and other taxes, which should accrue on said land, and, by the terms of the renewal lease, the lessee covenanted to pay, to the person or persons authorized to receive the same, all taxes, State and national, which should accrue on the said land, and also to keep and perform each and all the other covenants in the said original lease which were to be performed by the lessee.

At the time the said original lease was made, in 1792, neither the county of Norfolk nor the borough of Norfolk had power to tax land. At that time taxation of land by a county, city, or borough was unknown in Virginia, and the only taxation imposed by those divisions of government consisted of tithe or poll taxes. There had been, previous to 1792, State taxes upon land in the State of Virginia, but there was no taxation by the State of land at the time the original lease was made. At no time from 1792, when the original lease was made, down to 1896 did the State of Virginia tax any property belonging to a city, and, therefore, at no time during that period were any State taxes assessed upon lot No. 9 or the building thereon.

In the year 1896 the legislature of Virginia provided for the taxation, for State purposes, of property belonging to any county, city, or town which was leased for profit, and from then on State taxes have been paid by the plaintiff in error.

The city of Norfolk had never attempted to assess the lands leased under these ninety-nine year leases, or the building thereon, up to the time that the said lease was renewed in 1890. Attempts were made in the years 1894 and 1898, by the city of Norfolk, to assess a tax upon the building on lot No. 9, but, in each case, the corporation court of the city of Norfolk removed the assessment as illegal, upon the ground that the property belonged to the city of Norfolk.

Again, in the year 1903, the city of Norfolk, under its tax ordinance, assessed for valuation in the name of the lessee, the plaintiff in error in this case, the building on the leased premises, and the city collector attempted to enforce the payment of the tax so assessed on the building by levying on the office furniture of the plaintiff in error, and thereupon the plaintiff in error instituted in the Circuit Court of Norfolk City this suit, praying for an injunction against the collection of said tax.

This case is somewhat similar to its companion case of Perry *vs.* City of Norfolk, which has a place on the docket immediately ahead of this.

The original leases involved in the two cases are practically the same. The renewal leases, however, are different. The years for which the taxes are assessed and the mode of assessment are also different. In the case of Perry *vs.* City of Norfolk the assessment is for the year 1906, the land being assessed in the name of the city of Norfolk and the building in the name of the lessee. In this case the tax is for the year 1903 upon the building, which is assessed in the name of the lessee. There was no assessment for that year or previous years on the land.

Specification of Error.

The error complained of in this case is the holding by the Supreme Court of Appeals of Virginia that the city of Norfolk, under its tax ordinance, can compel the lessee to pay taxes on the fee-simple interest in the building on the leased premises, said premises being owned by the city of Norfolk. This construction of the taxing power of the city impairs the obligation of the contract of lease between the city of Norfolk and the plaintiff in error.

The plaintiff in error does not contend that his particular interest in the property (*i. e.*, the leasehold interest) could not be taxed without impairing the obligation of the contract, nor does the plaintiff in error contend that a State or municipal Government cannot, without violating the contract clause of the Constitution of the United States, impose on a lessee, as an easy means of collecting the tax, the duty of paying the tax upon the leased premises in the first instance, provided, of course, that such action gives the lessee the right to recover taxes so paid from the lessor, if the lessee has not agreed, under the terms of the lease, to pay the same.

The plaintiff in error's contention, in this case, is confined to the proposition that the city of Norfolk cannot tax its interest (*i. e.*, the fee-simple interest) in the premises and make the payment of the tax an obligation of the lessee without impairing the obligation of the contract of lease.

It is well to note here that the contention that such a tax is against the contract clause of the Constitution of the United States was made in the pleadings in this cause, and insisted on in the argument in the State courts. (See amended bill, paragraph 9, Record, p. 31.)

ARGUMENT.

The first question which naturally arises in a case of this kind is as to the jurisdiction of this court.

The claim that the tax upon the property impaired the contract of lease, contrary to the contract clause of the Constitution of the United States, was set up in the bill and insisted on in the argument in the State court. (See amended bill, paragraph 9, Record, page 31.)

The record shows that the City of Norfolk has, by legislation subsequent to the making of the lease, attempted to impose upon the lessee the burden of paying taxes on the fee-simple value of the property leased. The Supreme Court of Appeals of Virginia has upheld this action upon the part of the city. If this legislation, and the assessment of taxes under its authority, adds new duties and obligations to the lessee, as such, it necessarily impairs the obligation of the contract.

As was said in the recent case of Northern Pacific Railway *vs.* Duluth, 208 U. S., 583, 591:

> "The legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the State court gives effect to subsequent State or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court. New Orleans Waterworks Co. *vs.* Louisiana, 185 U. S., 336, 350, 351. And this jurisdiction has been frequently exercised in cases of municipal ordinances having effect upon prior contract rights."

With the jurisdiction of this court settled, the only question remaining is whether the tax ordinance of the city of Norfolk, as construed by the Supreme Court of Appeals of

Virginia, adds new duties and obligations to the contract of lease to be performed by the lessee.

Before considering the lease and the obligations of the lessee thereunder, we wish to direct the court's attention to the fact that the building on the leased premises, which has been assessed for taxation in the name of the lessee, belongs to the city of Norfolk, as lessor, and that the rights of the lessee therein and his obligations thereto are determined by the terms of the lease.

The City of Norfolk is the Owner of the Building.

The city of Norfolk is the owner of the land; it holds the fee-simple title. It is also the owner of the building, though the building was erected by the lessee. The moment the building was erected, it became, under the law of Virginia, incorporated into the land as a part of the freehold. The lease required the lessee to make improvements on the land, and there is no provision in the lease for the removal of the improvements by the lessee.

The Court of Appeals of Virginia has repeatedly decided that, where the terms of the lease require the lessee to erect buildings upon the leased premises, and there is no agreement for their removal by the lessee, he has no right to remove them.

In the case of Tunis Lumber Co. *vs.* Dennis Lumber Co., 97 Va., 682, 687, the court used the following language:

> "If as was said in the case of Deane *vs.* Hutchinson, *supra,* in discussing a similar provision in a lease, 'the covenant had been that the lessees, instead of erecting the building themselves, should furnish to the lessor the money necessary for that purpose, and the money had been furnished, and the building erected, in that condition of affairs the intention of the parties to *incorporate the building into the land, and to make it an inseparable part of the land,* might have been slightly more conspicuous than it is in the

covenant under consideration, yet the two covenants are so identical in all their essential parts, that, in my judgment, it would be impossible to give them different constructions on the point under consideration." (Italics ours.)

See also:

Peirce *v.* Grice, 92 Va., 763, 767;
Powell *v.* Pierce, 103 Va., 526;
Tait's Executor *v.* Central Lunatic Asylum, 84 Va., 271, 280.

It is clear from these cases that, where the lease requires the lessee to erect a building, and where there is no provision for the removal thereof by the lessee, the building becomes a part of the freehold at the moment it is erected, and that the lessor has the same interest therein that he has in the land upon which the building is erected, *i. e.*, the fee-simple title.

The case referred to by the defendant in error, in the argument before the Supreme Court of Appeals of Virginia, of Burbank *vs.* Board (La.), 27 So. Rep., 947, as authority to show that the City of Norfolk could tax the building, is not pertinent.

The court held, in that case, that the City of New Orleans could tax the buildings on the property leased by the city to the plaintiffs, because the buildings belonged to the plaintiffs under the end of the term, the lease having provided that at its termination the buildings "shall revert to the City of New Orleans."

There is no such provision in the lease in question, so it is unnecessary to discuss whether the language of the lease justified the conclusion reached by the court. At any rate, as we have seen, in Virginia, the improvements made under the requirements of a lease become, when erected, if there is no provision for removal by the lessee, an inseparable part of the land.

The only mode provided by the statutes in Virginia for the assessment of real estate is the assessment at its value in the name of the fee-simple owner or the life tenant and there is no plan for the separate assessment of a building from the land. The assessment book must show the value of the building on the lot, and the value of the lot, including the building, all being assessed in the name of the owner, and the estate of the owner (whether in fee or for life) must also be stated on the assessment book.

Sections 465 and 466 of the Code of Virginia, 1904, read, in part, as follows:

> "SECTION 465. What the table of lands in counties to contain:
>
> "In the table of tracts of land the commissioner shall enter each tract separately, and set forth in as many columns as may be necessary the name of the person who by himself or his tenant has the freehold in possession, his place of residence, the nature of his estate, whether in fee or for life * * * the value of the land per acre, including the buildings; the value of the lands and buildings; the sum included in the value on account of buildings." * * *
>
> "SECTION 466. What the table of town lots to contain.
>
> "In the table of town lots he shall enter separately each lot, and set forth in as many separate columns as may be necessary the name of the person, his residence and estate as in the table of tracts of land. The commissioner shall set forth in other columns * * * a description, where the person does not own the whole lot, of the part which he owns, the value of the buildings on the lot, the value of the lot including buildings." * * *

By section 481 of the Code of Virginia, 1904, there is a further provision for the assessment of buildings not theretofore assessed, whether old or new, and the value of the buildings is to be added to the value of the land. This section reads as follows:

"SECTION 481. Commissioner to assess value of any building not already assessed.

"The commissioner before making out his land book shall assess the value of any building and enclosures not theretofore assessed, whether old or new, found to be of the value of $100 and upwards. The value thereof shall be added to the value at which the land was before charged."

It is clear, therefore, that the owner of the fee or the life tenant only can be assessed under the statute law of Virginia, and that he must be assessed with the fee-simple value of the property, and that buildings cannot be assessed separately from the land.

Nevertheless, in this case, the city of Norfolk has assessed the building upon the leased premises in the name of the plaintiff in error, the lessee of the property, for taxes for the year 1903, although the land upon which the building stands was not assessed for taxation.

The point in dispute cannot be changed by the assessment of the building separately from the land and in the name of the lessee, instead of in the name of the lessor. The Court of Appeals of Virginia said in this case that, if the assessment of the building in the name of the lessee were wrong, it was harmless error. The main issue then remains, as the title to the building is in the city of Norfolk, can the city tax the building, in its own name or erroneously in the name of the lessee, and make the lessee responsible for the taxes?

Impairment of the Obligation of the Contract.

As we have seen above, if the tax ordinance, as construed by the Court of Appeals of Virginia, imposes a new obligation or duty upon the lessee as such, then such legislation is contrary to the contract clause of the Constitution of the United States.

If, then, the obligation to pay the tax upon the fee-simple interest in the leased premises is not imposed upon the lessee

by the contract of lease, but is imposed upon him only as a result of the municipal tax ordinance, then the tax ordinance is void. The question, therefore, is whether, under the terms of the lease, the duty of paying the taxes upon the leased premises is imposed upon the lessee?

The Decision of the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia held that, under the terms of the lease, the lessee was under this obligation. This conclusion was reached by that court apparently on two grounds: First, the court held that, because the lessee had the option to renew the lease every ninety-nine years, so as to continue the same in effect forever, he was "the substantial and real owner of the property," and should, therefore, bear the burden of taxation; second, the court, apparently, held that the covenants in the original lease requiring the lessee to pay, or cause to be paid, all public and other taxes which should accrue on the land required the lessee to pay to the city of Norfolk taxes which might be assessed by the city upon the fee-simple value of the property owned by it as lessor.

However, the construction placed by the State court on the contract of lease is not binding on this court, when the question at issue is whether the obligation of that contract is being impaired. And this court will place its own interpretation upon the contract of lease, in order to determine whether the imposition of the tax in question, under the city tax ordinance of the city of Norfolk, impairs the obligation of the contract of lease between the plaintiff in error and the city of Norfolk.

Northern Pacific Railway *vs.* Duluth, 208 U. S., 583, 590.

We will take up separately the two grounds upon which the Supreme Court of Appeals of Virginia held that, under

the terms of the lease, the lessee was under an obligation to pay taxes which might be assessed by the city of Norfolk upon the fee-simple value of the property which it owned as lessor.

FIRST. IS IT TRUE THAT THE LESSEE IS THE SUBSTANTIAL AND REAL OWNER OF THE PROPERTY AND SHOULD BEAR THE BURDEN OF TAXATION?

In discussing this phase of the case, we will pass over, for the present, the fact that there is a covenant in the lease with reference to the payment of taxes, and will consider what would be the effect of the lease in the absence of the covenant, which we will take up later.

The Court of Appeals of Virginia attempted to distinguish between an ordinary lease and the lease in question, and, in doing so, used the following language, in the companion case of City of Norfolk *vs.* Perry Company, 108 Va., 30:

> "While technically the relation of landlord and tenant exists between the city of Norfolk and the appellees, under the terms of the contract of June, 1797, to which we have adverted, it is manifest that the appellees are the substantial and real owners of the property upon which the tax, in question, is assessed. They have the right of possession, use and occupation forever, upon payment of the stipulated rent of $22.50 *per annum*, and they can assign or devise the same, and their heirs will take in case there is no assignee or devisee. In all essential respects, so far as liability for taxes is concerned, the appellees are in the position with respect to this property that the ordinary fee-simple owner would be. It is true that, as a general rule, in the absence of a covenant, the landlord under an ordinary lease is responsible for taxes on the property leased by him; but this general rule can have no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of the property and entitled to its use forever. In such a case, certainly for the

purposes of taxation, the mere legal title remaining in the landlord should be disregarded and the burden of taxation placed where it belongs, upon the lessee to whom the value and the benefit belong."

It will be seen here that the court holds the lessee to be *the substantial and real owner of the property,* because he has the right of possession, use, and occupancy at the rental of $22.50 per annum, and it will be further seen that the court declares that the general rule that the landlord, and not the tenant, is responsible for taxes on the property leased has no application to a case of a perpetual *leaseholder,* because such a tenant is, according to the court, *"the virtual owner of the property."*

It will be further seen that the court says that, in the case of such a lease, *the mere legal title* remaining in the landlord will be disregarded and the *burden* of taxation placed where it belongs.

It is evident that the court reached the conclusion that the lessee was the real and substantial owner of the property, because of the apparently small annual rental, although twenty-seven per cent of its cost, and also because the tenant was a "perpetual leaseholder."

We think the court was in error as to the facts, and was misled by the situation as it then appeared to the court, and it ignored the situation as it existed at the time the lease was made. Certainly the rights, obligations, and estates of the parties, as created by the lease, should be settled in accordance with the circumstances as they existed in 1792, when the lease was made, and the nature of those rights, obligations, and estates are not changed because the property has increased in value in the meantime, and the rental has become small as compared with that value.

We confidently assert that under the facts of this case, as disclosed by the record, no man, in 1792, would have held the lessee to be the substantial and real owner of the property. The rental to be paid by the lessee was a large one

as compared with the then value of the property. It was so large in fact that the leasing of the property netted the borough of Norfolk twenty-seven per cent, and the borough of Norfolk, as lessor, was so fearful lest the lessee should not live up to his contract that the lessee was required, by the terms of the lease, in case he failed to make improvements within three years, so as to secure the rent, to give security for that purpose until the improvements should be made. If the question had arisen in 1792 as to who was the real and substantial owner in connection with the payment of taxes on the property, and there had been no covenant in the lease with regard to the same, no court would have held, at that time, that the burden should fall upon the lessee, because he was the real and substantial owner of the property. It is improper, therefore, because the annual rental is now small as compared with the present value of the property, to construe the relations and obligations of the parties differently from what those relations and obligations would have been construed to be in the light of the circumstances existing when the lease was made.

As was said by this court, in the case of Citizens Bank *vs.* Parker, 192 U. S., 73, 80:

> "With the wisdom or folly of the charter we have nothing to do. Our sole function is to interpret it. It may seem, in 1903, to have been imprudent legislation, but how did it appear in 1833 and 1836? *We must contemplate it as of that time.*" (Italics ours.)

Nor is the lessee a "perpetual leaseholder." The lessee may, it is true, at his option, renew the lease every ninety-nine years indefinitely, but he does not have to renew; it is entirely within his option. There is a very decided difference between a lease, where the lessee has the option to renew, at stated periods, so as to continue it indefinitely, and a perpetual lease, where the lease does not have to be renewed, but is binding on both parties forever. In the latter

case the lessee is a perpetual leaseholder. In the former case he will cease to become a leaseholder at the end of any of the stated periods, unless he, at his option, enters into a new contract, and, therefore, he cannot be called a perpetual leaseholder.

No one, when the lease was made in 1792, could have predicted, with any confidence, whether or not it would have been in the interest of the lessee to renew at the expiration of the first period of ninety-nine years. *That he had the option to renew, and was not obliged to do so, was a material feature in the lease, and fixed the status of the parties.* It kept the lessee from being a perpetual leaseholder, and gave him the right to surrender the premises, should he so desire. No court, construing the lease in 1792, would have held that the lessee was a perpetual leaseholder. The most the court would have held was that he had a right to renew, but it could in no sense have considered him the virtual owner of the property merely because he could renew the lease at the end of ninety-nine years.

It would not be difficult to name places where a similar lease would not have been renewed by the lessee at the expiration of the ninety-nine years. There are many places in this country which were of more importance and where the land was of higher value in 1792 than it was in 1891, ninety-nine years later.

The principle apparently announced by the Court of Appeals of Virginia will not stand analysis. It cannot be successfully contended that the lessee in any lease, which he has the option periodically to renew so as to continue the same indefinitely is, merely because of that option, a "perpetual leaseholder" or "virtual owner of the property" or the "real and substantial owner of the property."

It is impossible to call a person a perpetual leaseholder or the virtual owner of the property, or the real and substantial owner of the property, when he may, after a definite period of years, merely by reason of the expiration of the

contract of lease, be entirely without interest in the property. The bare fact that the court thinks that he may renew the lease, when it expires, cannot make him a perpetual leaseholder, or the virtual owner of the property, or the real and substantial owner of the property.

We cannot see any difference, so far as taxes are concerned, between a lease which may, at stated periods, at the option of the lessee, be renewed from time to time, so as to continue indefinitely, and a lease for a definite period, with the right to the lessee to purchase at the expiration of the lease. Suppose a lease is made for five years, with the right to the lessee to purchase the property at a given price at the expiration of the five-year term, it could hardly be contended that such a lessee, because of that option, was the real and substantial owner of the property, or the virtual owner thereof, yet his "right of possession, use and occupation forever," upon the payment of the rent during the five years and the payment of the purchase price at the expiration thereof, could not be questioned. The holder of such a lease and option could "assign and devise" the same, and his personal representatives would take, in the absence of an "assignment or devise," as readily as they would in the case of a lease like the one in question. He has, or can have, all the benefits which the Supreme Court of Appeals of Virginia has pointed out belong to, or can belong to, the lessee under the lease in question.

If the holder of a definite lease, with the option to purchase, is not chargeable with taxes on the property, but the landlord is required to bear the burden, we fail to see how the holder of a definite lease, with the right to renew the same periodically, can be held liable for the taxes instead of the landlord.

Suppose the Court of Appeals of Virginia were called upon to construe a lease exactly similar to the one in question, when ninety-eight years of the term had expired, and suppose that the property leased had greatly decreased in

lue and that the rental exceeded its then annual value d, therefore, it was practically certain that the lessee would t exercise his right to renew at the expiration of the term. ould the court, under such circumstances, have held the see "the virtual owner of the property" when he would se to have any interest in it within a year, by no act on s part, but merely by the expiration of the lease which was ing construed? Could the lessor be held to have "the mere gal title" to the property when he would within a year ve his fee-simple interest freed of any lease by the mere piration of the contract which was being construed?

The Supreme Court of Appeals of Virginia has, in our dgment, because of the small rental as compared with the esent value of the property, failed to appreciate the fact at the lease is not necessarily renewed at the expiration of term, and that the right of renewal is at the option of the see. The court has overlooked the fact that there is a *version* in the lessor. And, when lands are granted in nsideration of a rent for a period of time less than the ssor has in the premises, the contract is a lease and the rela-on of lessor and lessee is established.

2 Minor on Real Property, sec. 1200.

Wells vs. Savannah.

The Supreme Court of Appeals of Virginia was misled by t properly distinguishing between this case and the case Wells *vs.* Savannah, 181 U. S., 531, upon which it ap-arently relied.

The differences between the two cases are most material. the Savannah case the land (*i. e., the fee-simple interest*) as *sold* at public auction, with the right to the purchaser, he desired, to pay the interest, at the rate of five per cent. pon the purchase price as a rental until he should de-rmine to pay the purchase price, which he could do at any me, and receive a deed for the fee. While in this case e *lease of the land* for ninety-nine years was put up by the

borough of Norfolk at public auction to be bid for at an annual rental. No purchase price of any kind was fixed, and there was no right upon the part of the lessee to pay a purchase price and acquire the fee. Again, in the Savannah case, the lessee or purchaser was bound forever, and he had to pay the so-called rent until he should pay the purchase price. While in this case the lease expired, and all obligations of the lessee thereunder, at the expiration of ninety-nine years, unless it should be renewed, at the option of the lessee. In the Savannah case there was no reversion in the lessor, therefore the contract was not a lease, even technically. In this case there is a reversion in the lessor and the contract is a lease in substance and reality.

Moreover, in the Savannah case, it was recited in the deed that the conveyance was made and the rights of the purchaser thereunder were conferred "subject only to such assessments and burthens as shall be in common with other lot-holders in the said city."

This court rested its decision on this provision of the lease. After discussing whether, under such a contract as existed in the Savannah case, the purchaser was the real owner who should bear the burden of taxation, it said, page 547:

> "It is not necessary to decide this question, however, as the specific language of the deed places the burden of paying the taxes on the purchaser and his grantees."

The court also said, page 544:

> "We think the language subjecting the lessee to the same assessments and burthens as were laid in common with other lot-holders created a valid agreement, and made the lands subject to the same kind of taxation as is levied upon other lots in the city."

There is no provision in this case making the lessee subject to the same assessments and burdens in common with other lot-holders. The only provision in the lease in ques-

tion with reference to taxation is the provision which requires the lessee to pay the public and other taxes which shall accrue on the land.

It is evident that, in the Savannah case, the test of the purchaser or lessee being liable to taxation is whether the other lot-holders are subject to the taxation. While the test in this case is whether the lessor would be liable for, and would have to pay, the taxes if they were not paid by the lessee, for the covenant in the lease in question is merely a covenant to pay such taxes as the lessor may be liable for on the demised premises.

Nor are the facts similar, so as to make at all applicable the dictum of this court in the Savannah case that the so-called lessee in that case should be more nearly described as owner than as lessee and, therefore, should bear the burden of taxation. Nor can the expressions used in the Savannah case of "perpetual tenant" and "substantial owner" be applied to the lessee in this case.

The so-called lessee in the Savannah case was a perpetual leaseholder, with irrevocable right to become the purchaser at an agreed price. He held the property forever and was under obligation to pay forever the rental or interest, unless and until he should pay the purchase price agreed on. He was the virtual owner of the property.

In this case the lessee's interest in the property ceases at the end of the term. He is under no obligation to pay rent beyond that period. He cannot be called, therefore, a perpetual leaseholder. Nor can he be called the virtual owner, when he will cease to have an interest in the property at the expiration of the lease, unless he enters into a new lease

Any parallelism drawn between the two cases is superficial and not real.

It is clear to us, therefore, that there is nothing in the lease in question to distinguish it, in any material particular, from the ordinary lease, and that the rights and obligations of landlord and tenant under the lease in question are the same

as those in ordinary leases, and, in the absence of a covenant requiring the lessee to pay the taxes on the property, there is no obligation upon him to do so.

SECOND. NOR DOES THE COVENANT IN THE LEASE WITH REFERENCE TO THE LESSEE PAYING TAXES REQUIRE THE LESSEE TO PAY TAXES ASSESSED BY THE CITY OF NORFOLK ON ITS OWN PROPERTY.

By the terms of the original lease the lessee covenanted to pay the public and other taxes which should accure on the property. This language was changed in the renewal lease, but we will pass that matter for the present.

The Court of Appeals of Virginia held that this covenant in the original lease was broad enough to require the lessee to pay to the city of Norfolk a tax which the city of Norfolk assessed against the building owned by it.

It is respectfully submitted that this covenant in the lease, requiring the lessee to pay the taxes which shall accrue on the property, is a covenant of protection to the lessor whereby the lessee agrees to pay the taxes which, but for the covenant, the lessor would have to pay.

As stated in Cooley on Taxation, 3d ed., p. 822:

> "The lessee's assumption of the payment of taxes and assessments does not relieve the lessor from his liability for them to the State or municipality, nor does it enable the taxing authority to secure a personal judgment against the lessee."

It has held in the case of Davis *vs.* Cincinnati, 36 Ohio St. 24, that an assessment for the construction of a sewer could not be personally enforced against the lessee by the municipality, although the lessee covenanted in his lease to pay all assessments upon the property demised.

The Court of Appeals of New York, in speaking of such a covenant in the case of Rector, &c., Trinity Church *vs.* Higgins, 48 N. Y., 532, 535, said:

> "The covenant is broken when the defendant neglects to pay taxes or assessments *duly imposed.* (Italics ours).

The court held, in the case of Scott *v.* Society, 59 Neb., 571, as follows:

> "By assuming in the lease the payment of taxes which shall be subsequently assessed upon the demised premises, a tenant does not thereby obligate himself to pay any taxes which may be illegal and void."

Unless, then, the taxes against the building were legally assessed and could be legally enforced against the lessor, no obligation can exist, under the covenant, upon the part of the lessee to pay them.

It is contended by the City of Norfolk that the lessee is chargeable with taxes on the improvements, because they were made by him, and counsel for the City of Norfolk have referred to the following authorities as sustaining that position: 18 Am. and Eng. Enc. of Law, 651; Watson *vs.* Home, 14 E. C. L., 45; and Mayo *vs.* Carrington, 19 Gratt., 74.

This doctrine, as shown by these authorities, has effect only as between the landlord and the tenant, and has its foundation in the principle of indemnity and protection to the landlord, and can have no application unless the taxes are legally assessed and legally enforceable against the lessor.

This brings us to the proposition whether a city can tax itself.

Can the City of Norfolk Tax its Own Property?

That a city cannot tax its own property is a proposition, it seems to us, which is axiomatic.

The Court of Appeals of Virginia, however, held that a city could tax itself, and in this connection used, in the com-

panion case of City of Norfolk *v.* Perry Company, 108 Va., 33, the following language:

> "Based upon the contention that the property here involved belongs to the city, as lessor, it is insisted by the appellees that the city of Norfolk has no power to tax its own property. Ordinarily the State does not tax its own property, but it has the power to tax it, if it sees fit to do so. Cooley on Taxation (3rd. ed.) p. 263. And this would be true also of a city having general powers of taxation, as the city of Norfolk has. Norfolk *v.* Norfolk Landmark, 95 Va., 564, 28 S. E. 959.
>
> The reason governments of a State or city do not tax their own property is that it would render necessary new taxes to meet the demands of such a tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. Cooley on Taxation, *supra.*"

It will be seen that the Court of Appeals of Virginia, in announcing the proposition that a city could tax its own property, relies on Cooley on Taxation, third edition, page 263.

We think that the Court of Appeals of Virginia misunderstood what was meant by the eminent author on this point. Judge Cooley was discussing what property was impliedly exempt from taxation, and, in referring to the properties which are impliedly exempt, used the following language:

> "Such is the case with property belonging to the State and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy."

In our judgment Judge Cooley did not mean to announce the proposition that a State could tax its own property, that a city could tax its own property, or that a county could tax its own property. What he did mean to announce was that a State could tax the property of a city or county; that a city, with the State's consent, could tax State property or county property within its corporate limits, and that a county, with the State's consent, could tax the State's property or a city's property within its limits.

The cases referred to by Judge Cooley were cases where one division of Government was attempting to tax the property of another division of the Government within its limits, and the right to do so was upheld where it was clearly given by statute.

No case was referred to by Judge Cooley, nor, in our judgment, can any case be found which holds that a State can tax its property, or a city can tax its property, or a county can tax its property. While, on the other hand, there are numerous cases quoted in the brief of the plaintiff in error in the companion case of Perry Company *vs.* City of Norfolk, which deny that a State, city or county can tax itself.

In the absence of sustaining authority, the proposition that a city can tax its own property would seem to us absurd. The assessment of property for taxation creates an indebtedness on the part of the person taxed to the Government assessing the tax. No person or corporation, whether private or public, can be indebted to itself. It is a legal absurdity. The city of Norfolk cannot owe itself money any more than an individual can owe himself money.

It may be true that a city could have its collector demand of its treasurer the payment of a certain amount of money claimed as a tax on its own property, and after the treasurer had paid the collector the money demanded, the collector could pay the money back to the treasurer to be covered into the city's funds. All this could be physically done. So

could a man take $10.00 in his right hand and transfer it to his left hand, but in either case, from a legal standpoint, the action would be a nullity. No indebtedness would have been created, and no indebtedness would have been paid.

As is said by James M. Gray, in his work on Limitations on Taxes and Power of Public Indebtedness, page 655:

> "It would be manifestly absurd for the State to tax itself, to take money out of its treasury with which to pay taxes back to the treasury, which is all such taxation would amount to."

The true theory of taxation is that taxes are paid for the support of the Government in return for the protection which the Government gives.

27 Am. & Eng. Enc. of Law, 581.

It is clearly illogical to say that the city of Norfolk can pay the city of Norfolk for protection granted by the city of Norfolk to the city of Norfolk.

If, then, the city of Norfolk cannot tax its own property, there is nothing in the lease in question, either expressed or implied, which can require the lessee to pay to the city of Norfolk taxes which are not legally assessed against the property.

Had the lease required the lessee to bear the same burdens as were borne in common by the owners of lots in the city of Norfolk, as was the case in Wells *vs.* Savannah, 181 U. S. 531, or if the lease had required the tenant to pay to the city of Norfolk, in addition to the rent, an amount which would be equal to what would be the city tax upon the property, there could be no question as to the lessee's liability to the city of Norfolk. But, in this case, however, the city's right to compel the lessee to pay the taxes rests entirely upon the taxes being legally assessed and the city of Norfolk being liable therefor as lessor. If the taxes are not legally assessed, no obligation rests on the lessee with reference thereto.

The case of Hart *vs.* Town of Cornwall, 14 Conn., 228, quoted by the defendant in error before the Supreme Court of Appeals of Virginia, is not in point.

The land, in that case, had been leased or sold by the Town of Cornwall for nine hundred and ninety-nine years, in consideration of £327 10s. There was no rent, in the usual acceptation of that word, to be paid from time to time during the term, and there was no contention, as in this case, that the Town of Cornwall could not tax the property, because it owned it as lessor. Indeed the lessee, without the burden of paying rent from time to time, and having the right of possession for nine hundred and ninety-nine years, was more of a purchaser than a lessee, and that this was recognized by the court is shown by its speaking of the lessor in the opinion as "lessor or vendor."

The sole question at issue, in the case under consideration, was whether a statute granting exemption from taxation could be repealed without impairing the obligation of the contract in question. The court held that it could be, because a provision in the lease showed that the parties contemplated and provided for the possible repeal of the statute. The point involved in this case was not raised or considered.

Terms of the Renewal Lease.

As we stated above, by the terms of the original lease the lessee was required to pay the "public and other taxes" which should accrue upon the property, while, by the terms of the renewal lease, the lessee is only required to pay the "State and national taxes" which may accrue on the land.

It will be contended by the defendant in error, the city of Norfolk, that the officers executing the renewal lease had no authority to make the terms of the renewal lease different from the terms of the original lease, because the resolution of the city councils authorizing a renewal required it to be under the same terms and conditions as the original lease. With this contention the plaintiff in error takes issue.

The resolution of the common and select councils of the city of Norfolk authorizing the renewal of the lease in question is in the following language:

> "Whereas the lease of Town Point lot No. 9 originally made by the borough of Norfolk to William Williams, his executors, administrators and assigns, for a term of ninety-nine years from the 26th day of August, 1792, renewable forever, of record in the clerk's office of the corporation court of the city of Norfolk in Deed Book No. 3, page 27, has by a number of mesne assignments become the property of George Sergeant, trustee for Eliza F. Sergeant, the wife of William Henry Sergeant, who is now the owner thereof, and
>
> "Whereas the original term of ninety-nine years of the said lease will expire in the course of a few months, and the said Elizabeth F. Sergeant, who contemplated erecting extensive improvements on the said property is entitled to and desires a renewal to her said trustee of the said lease, according to the terms thereof, and has petitioned the councils so to renew the said lease, which said petition was referred by the common council to the finance committee and has by said committee been returned to this body with the recommendation that the same be granted:
>
> "Be it therefore resolved by the common and select councils of the city of Norfolk that the presidents of the common and select councils of the city of Norfolk be and they are hereby authorized and instructed to execute on behalf of the city of Norfolk as the legal successor of the borough of Norfolk, a renewal of the said lease for another term of ninety-nine years, renewable forever, according to the terms thereof, to the said George H. Sergeant, trustee for Elizabeth F. Sergeant, his executors, administrators and assigns, in such form as may be approved by the city attorney, and that the city treasurer be and is hereby authorized and instructed to affix the seal of the city of Norfolk to the said renewal lease when the same shall have been so executed, and to deliver the same to the said Elizabeth F. Sergeant, or her agent or attorney" (Record, p. 25).

In this resolution of the councils the preamble recites that Elizabeth F. Sargeant, the tenant, is "entitled to * * * a renewal of the said lease according to the terms thereof." Clearly this expression, "according to the terms thereof," qualifies the word "entitled" and merely means that, in accordance with the terms of the original lease, Elizabeth F. Sargeant is entitled to a renewal. In the body of the resolution the presidents of the councils were authorized to execute a renewal of the said lease "for another term of ninety-nine years, renewable forever, according to the terms thereof." Here, again, the expression "according to the terms thereof" clearly has reference to the fact that the new lease should be for ninety-nine years, as such renewal term was provided for by the terms of the original lease. The body of the resolution went on to say that the presidents of the councils should sign "the renewal lease in such form as may be approved by the city attorney."

The material question before the councils was the granting of a new lease to Elizabeth F. Sargeant for another term of ninety-nine years at the same rental. How the provisions of the lease were to be expressed was left to the city attorney. Unless the councils desire to pass on every detail and every expression to be used in the renewal lease, it was absolutely essential to leave such details to some one to determine for them. The councils did what was natural. They determined upon the main feature, a renewal of the lease for ninety-nine years at the same rental, and left the details to the city attorney. It was manifestly improper to renew the lease in exactly the same language as the original lease which had been drawn ninety-nine years previously. The language used in the original lease no longer had the meaning that it had when originally used, and, therefore, the councils, instead of saying that the renewal lease should be in the same language as the original lease, determined on the main features and left to the city attorney the drafting of the provisions affecting the minor details. That they

could do this there can be no question, and, to our minds, that this is what they did do is also clear.

The original lease expressed the rental in colonial currency. The renewal lease, as approved by the city attorney, expressed it in dollars and cents. Here the city attorney, as authorized, fixed the form of the renewal lease, putting the rental in modern terms. So also he put the clause as to taxation in modern terms as understood at that time, namely, as subjecting the lessee to the payment of State and national taxes.

A point very similar arose in the case of Wells *vs.* City of Savannah, 181 U. S., 531. The grantees in that case claimed that they were not required to pay assessments placed upon the property, because the resolution of the councils of the city of Savannah authorizing the grant did not provide that the land should be subject to "assessments," but only to "burthens," and the word "assessments" was inserted in the deed without the authority of the councils.

The court, on page 543, says: "It (meaning the insertion of the word 'assessments' in the deed) was to provide for one of the details connected with the sale, and there was an implied power under the ordinance so to do."

In the case at bar an expressed, not merely an implied, power was given to the city attorney to draw and approve the form of the lease and to cover all the details not provided by the councils.

Nor is this all. The renewal to Elizabeth F. Sargeant took effect in 1891. She transferred her rights to the plaintiff in error. The city has been receiving the rent and recognizing the existence of the renewal lease from 1891 up to the present time, and is surely estopped from now questioning the terms of the lease under which it had received the rent for fourteen years when this suit was brought.

The city of Norfolk further insists that the plaintiff in error is obliged to pay "public and other taxes" as provided in the original lease, because of the provision in the renewal

lease binding the lessee "to keep and perform each and all the other covenants in said original deed contained."

The clause in the deed reads as follows:

> "And further that the said George H. Sargeant, trustee as aforesaid, his successors and assigns, will pay or cause to be paid to the person or persons authorized to receive the same, all taxes, State and national, which shall accrue on the said land, and also will keep and perform each and all the other covenants in said original deed contained and by the lessee therein named, his heirs and assigns, to be kept and performed."

This provision is a part of the clause in which it is provided that the lessee shall pay the State and national taxes which may accrue, and clearly had reference to other covenants in the original lease than that of taxation which has just been provided for.

Conclusion.

We have felt it unnecessary in this brief to include therein the authorities which are set out in the brief of the plaintiffs in error in the companion case of Perry Company *vs.* The City of Norfolk, but we respectfully refer to the cases there quoted as authorities in this case.

Respectfully submitted,

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NOVEMBER 15, 1910.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 103.

J. W. PERRY COMPANY AND JOHN L. ROPER, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

No. 104.

WILLIAM H. WHITE, PLAINTIFF IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

WALTER H. TAYLOR,
WILLIAM LEIGH WILLIAMS,
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Counsel for Plaintiffs in Error.

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SUPPLEMENTAL BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

In the oral argument of this case on Thursday, March 16, 1911, considerable attention was unexpectedly paid to the question whether or not The City of Norfolk, by virtue of

the Virginia Constitution or legislative enactments, could impose a tax upon itself, and section 183 of the Constitution of Virginia (1902) was referred to as authorizing such taxation. While not admitting the construction of this section as urged by counsel for the city, still, in the view we take of the contractual obligation assumed by the lessees, and it is only by virtue of such assumption that they are liable for taxes on the city's fee-simple estate at all, it is immaterial whether this authority is conferred upon the City of Norfolk or not. The theory of the decision of the Supreme Court of Appeals of Virginia is that the City of Norfolk, by virtue of the general power to tax, can tax itself. Let even this be conceded, still, the city's power in that regard is no greater than its power to contract and be contracted with, or to sue and be sued, and yet it could hardly be claimed that an obligation by a third person to discharge and satisfy any judgment that might be obtained against the City of Norfolk would impose the duty upon the obligor to discharge and satisfy a judgment which the City of Norfolk as plaintiff had obtained against the City of Norfolk as defendant. In the same way an obligation to discharge every contract that the City of Norfolk might enter into would not impose upon the obligor any duty whatever to discharge a contract in which the City of Norfolk on the one part contracted with the City of Norfolk on the other part.

Thus, it has been held that whenever a note or bond comes into the hands of the maker, with a right to enforce it, a surety thereon is discharged.

Johnson *vs.* Hicks, 97 Ky., 116; 30 S. W., 3;
Ashoff *vs.* Van Brunt, 84 Mich., 575; 48 N. W., 151;
Commonwealth *vs.* Royer, 161 Pa. St., 351; 29 Atl., 36;
In re McIntosh, 158 Pa. St., 525; 27 Atl., 1042.

Similarly, if a mortgagee purchase the mortgaged land, or if a purchaser of land takes an assignment of a judgment which is a lien on the land, a surety for the indebtedness is discharged by the merger of the right and liability in one person.

Wright *vs.* Knepper, 1 Pa. St., 361;
Johnson *vs.* Young, 20 W. Va., 614.

So, if a landlord takes an assignment of a lease, a surety for the rent is no longer liable.

Smith *vs.* Thurston, 19 Mo. App., 48.

In the language of the court in Municipality No. 2 *vs.* Groning, 15 La., 166, *"Sublato fundamento, cadit opus."*

The liability of these lessees grows out of a contract and not out of the power of taxation. The question to be determined is not whether the lessees are exempt from city taxation on the fee-simple estate, which is not theirs, but rather whether they have assumed to pay such taxes under their contract. This is a matter of general law in the decision of which this court exercises its independent judgment. We earnestly contend that a proper construction of the contract is that the lessees will pay such taxes as the City of Norfolk, but for such contract, would be called upon to pay to the ultimate and permanent depletion of its treasury. This cannot possibly apply to these taxes.

Under the doctrine of the cases above cited, when the payor and payee are one and the same person the debt is discharged by the merger of the right and liability, and the surety necessarily discharged. *"Sublato fundamento, cadit opus."*

This inevitable conclusion is in no way dependent upon the ability or lack of ability of the City of Norfolk to tax, but rather upon what taxes the lessees have agreed to discharge. They would be likewise immune if their agreement had reference to contracts or suits, in which matters the city's authority is unquestioned.

The Federal Question.

It would seem to be needless to cite authorities for the proposition that this case is not controlled by the doctrine of Henderson Bridge Company *vs.* Henderson, 141 U. S., 679, and Moffitt *vs.* Kelly, October Term, 1910, decided November 28, 1910. In neither of these cases was the court construing a contract with reference to subsequent legislation. In the latter case, in fact, it was very properly said that the property interest under discussion was a taxable subject, no matter which of two constructions was placed upon it. The former case was distinguished in Wilmington & Weldon R. Co. *vs.* Alsbrook, 146 U. S., 279, a case similar to the present. Mr. Chief Justice Fuller, in delivering the opinion, says as follows:

> "The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.
>
> "In arriving at its conclusions, however, the State court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and, as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

Then, after referring to the case of Henderson Bridge Co. *vs.* Henderson, among others, he continued:

> "But in the case in hand the court passed upon the action of the authorities in virtue of a legislative act approved more than fifty years after the making of the supposed contract, and explicitly upheld the law."

That, according to our understanding, is identically what the Virginia court did in the present instance. We therefore feel that this court should consider what was the contract between the parties, and the obligations and rights growing out of the same. Having determined that, it should then inquire whether the tax on the city's fee-simple estate, which is sought to be enforced against the lessees, impairs the obligation of their contract. The sole question, therefore, resolves itself into a determination of whether or not the tax sought to be imposed was ever assumed by the lessees, and in construing the contract, according to reason, amply sustained by the authorities above cited, together with those in our original brief, we believe that the court could and should find that the taxes in question were never assumed by the plaintiffs in error, and that the action of the city authorities in assessing the same and seeking to collect them from the lessees, and the State court in holding them liable for them, thereby imposed an additional burden never agreed to, as a result whereof the obligation of their contract was impaired.

Respectfully submitted,

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FILED.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 103.

J. W. PERRY COMPANY AND JOHN L. ROPER,
PLAINTIFFS IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

NATHANIEL T. GREEN,
Counsel for The City of Norfolk, Virginia.

IN THE

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vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

I.

STATEMENT OF FACTS.

This case is here upon the contention of the plaintiffs in error that certain municipal ordinances of the City of Norfolk, Virginia, enacted in pursuance of legislative authority from the State of Virginia, under which taxes have been assessed upon certain property owned by them, violate that portion of the Constitution of the United States which

provides that "no State shall pass any law impairing the obligation of contracts." The case is within such a narrow compass as to admit of a brief statement of the facts.

In the year 1792 the Borough of Norfolk owned certain lands located in that borough known as Town Point Land. It divided this land into lots and leased the lots to various individuals on long-term leases with the right of renewal forever. One of these leases so made was executed in June, 1797, and covered lot No. 10 of the Town Point Land. Richard Evers Lee was the lessee of this lot and the consideration for the lease was an annual rent of six pounds and fifteen shillings, or at that time $22.50 in United States money, to be paid to the Borough of Norfolk and a covenant by the lessee, Lee, for himself, his executors and assigns, to "pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land." When the original lease so made to Lee was about to expire the same was renewed by the City of Norfolk to Caroline F. Hare, the then owner of the same, and there was contained in the renewal lease precisely the same covenants and conditons as in the original lease. By successive assignments the plaintiffs in error have become owners of the property and have erected valuable buildings thereon. The State has regularly assessed the property for taxes and in 1906 the assessed value of this lot for State purposes was twenty-seven thousand and five hundred dollars. In said year, 1906, the City of Norfolk imposed taxes on the land and buildings amounting to four hundred and fifty-three dollars and seventy-five cents, and to enjoin the collection of those taxes out of themselves plaintiffs in error brought this suit, and they allege that if they are required to pay these taxes the obligation of the lease under which they hold the property is impaired.

II.

THE JUDGMENT OF THE SUPREME COURT OF APPEALS OF VIRGINIA SHOULD BE AFFIRMED BECAUSE IT PROCEEDS ON NON-FEDERAL GROUNDS SUFFICIENT TO SUSTAIN THE SAME.

By reference to the opinion of the Supreme Court of Appeals of Virginia in this case (108 Va., 28) it will be seen that that court held that the plaintiffs in error were liable for these taxes on the principle that they were the real owners of the property, and in speaking to this point the court uses the following language:

> "It is true that, as a general rule, in the absence of a covenant the landlord under an ordinary lease is responsible for taxes on the property leased by him: but this general rule can have no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of the property and entitled to its use forever. In such a case, certainly for the purpose of taxation, the mere legal title remaining in the landlord will be disregarded and the burden of taxation placed where it belongs, upon the lessee to whom the value and the benefits belong."

In so holding the court cited and relied upon the case of *Wells vs. Savannah,* 181 U. S., 531. The same attempt to distinguish that case from this was made in the Supreme Court of Appeals of Virginia as is now made in the brief of opposing counsel, but the Virginia court did not regard the distinction as sound. In the *Wells Case* the plaintiff held the lot paying a ground rent therefor with the right to purchase the same from the city of Savannah from whom he had leased it, and it was while said lot was *in that condition* that the city of Savannah levied the tax thereon. It will

be noted *that at the time the tax was levied the legal title* was in the city of Savannah and that the relation existing between the city of Savannah and Wells was that of landlord and tenant under a perpetual lease. The only difference between that case and this was that the lessee there had in addition a mere unexercised option to purchase, but the fact remains *that at the time the tax was levied he had not exercised that option and the relation between himself and the city was precisely the same as that between the lessee and the city in this case.* It was held that the lessee should pay the taxes.

It is believed that the decision of the Supreme Court of Appeals on this phase of the case was correct, but whether correct or not it involves no Federal question and is not subject to review by this court. Courts may very well differ as to whether a perpetual lessee is to be regarded as a real owner of the property for the purposes of taxation, and the fact that such a lessee's property is situated in a State which holds him liable for the taxes and thereby adds to his burdens does not necessarily impair the obligation of his lease. See *Northern Missouri Company vs. McGuire*, 20 Wal., 46 and quotation therefrom hereinafter made.

There is still, however, another non-Federal ground upon which the judgment of the Court of Appeals of Virginia rests that justifies this court in affirming said judgment, and that is that the opinion of the State court is based wholly upon the ground that the proper interpretation of the lease was that the lessee voluntarily agreed to pay these taxes. There was no covenant whatsoever in the lease, as we shall hereinafter point out, looking to an exemption of this property from city taxation and the question before the Supreme Court of Appeals of Virginia resolved itself simply into two propositions; first, whether the City of Norfolk could tax its own property; and second, whether the lessees were liable, either under the covenant "to pay all public taxes" or otherwise, for such taxes as the city itself had authority

to levy. The Virginia court answered all of these propositions in the affirmative. It held that the city could tax its own property, if it saw fit, under the powers contained in its charter and that under the lease, however interpreted the lessees were liable therefor.

Under the case of *Henderson Bridge Company vs. Henderson City*, 141 U. S., 679, this was not the decision of a Federal question by the Supreme Court of Appeals of Virginia and its judgment should therefore be affirmed. In that case the city of Henderson had granted the bridge company certain rights relative to the erection of a bridge across the Ohio River and section four of that ordinance provided,

> "That nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city."

The city proceeded to tax a portion of that bridge that was within the city limits but over the river and the bridge company claimed that such taxation impaired the obligation of their contract. The Court of Appeals of Kentucky held that the contract was not impaired by such taxation, and this court, speaking through Mr. Justice Blatchford, said:

> "The opinion of the State court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a Federal question, and is broad enough to dispose of the case, without reference to any Federal question. This court cannot review the construction which was given to the ordinance as a contract, by the State court."

It is well settled that "when the State court decided a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment, if the non-Federal ground, fairly construed, sustains the decision. See *Berea College vs. Kentucky,* 211 U. S., 45.

III.

BUT THERE IS IN TRUTH NO CONTRACT OF EXEMPTION FROM CITY TAXATION IN THIS CASE AND THEREFORE NO IMPAIRMENT OF THE OBLIGATION OF A CONTRACT.

We look in vain for language in this lease exempting these lessees from municipal taxation. The only provision of the lease on that subject is a covenant by them to *"pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land."* This is anything else than a provision exempting them from municipal taxation. The endeavor to read into it an exemption from such taxation rests entirely upon implication. It is said that that covenant means that the lessees will pay such taxes as the City of Norfolk should be bound to pay; that inasmuch as the City of Norfolk will not be bound to pay taxes to itself the lessees should not pay taxes to it; and that there were no city taxes at the time this lease was made and therefore the covenant to pay "public taxes" does not cover city taxation. We have here three implications on which the claim for exemption rests: first, the implication that because there were no city taxes at the time the lease was made such taxes are not within the express covenant to pay public taxes, and that this covenant shows that the lessee was to pay only a certain sort of taxes and impliedly excluded the payment by him of city taxes; second, the implication that the City of Norfolk cannot tax

its own property; and third, the implication that as between a landlord and a tenant under a perpetual lease in the absence of a covenant the landlord must pay the taxes.

We challenge the designation of any provision of this lease exempting these lessees from taxation, and it is well settled that such an exemption must rest upon an express contract and not upon mere implication or deduction.

In *Home Telephone Company vs. Los Angeles,* 211 U. S., 265, 273, Mr. Justice Moody says:

> "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized."

In *St. Louis vs. United Railways Company,* 210 U. S., 266, 273, the city of St. Louis had granted certain rights in certain streets to a street railway company and the street railway company had agreed to pay for the use of the streets for a given period certain stipulated sums of moneys or percentages of its gross earnings. The city of St. Louis levied a license tax on the street railway company and the latter claimed that it was exempted because it had covenanted to pay the percentages, etc. The exemption was, however, denied by this court, speaking through Mr. Justice Day, who uses the following language relative to the claim:

> "The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that said deprivation can only follow when the State or city has concluded itself by the use of clear and unequivocable terms. *The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption."*

To the same effect is *Metropolitan Street Railway Company vs. New York,* 199 U. S., 1, in which Mr. Justice Brewer examines the cases in this court in detail.

It is clear therefore that when an exemption from taxation is claimed under a contract, the party claiming it must point out specifically an express exemption in the contract.

But to go even further than this, it is submitted that there is an express contract here not exempting but requiring these lessees to pay these taxes. The circumstances surrounding the parties when the original lease to Lee was made demonstrate what was meant by the covenant to pay all "public taxes" on the part of the lessee. The Borough of Norfolk was of English origin and was created by letters patent of George II on the 15th of September, 1736. These letters patent were confirmed by an act of the General Assembly in the same year. Other acts affecting the borough prior to the lease to Lee were passed in 1752, 1757, 1761, 1762, 1772, 1787, 1788, 1790, 1793, and in 1796. From an inspetcion of all these acts it will be seen that there was only one method of taxation entrusted to the borough (except perhaps the right to license some especially designated businesses and the right to collect tolls for holding markets, etc.), viz: a levy of assessments on the inhabitants of the borough. The borough could not levy a tax on land, and it is therefore true that at the time the lease was made the borough could not have taxed these lands. But it is also true that at the same time no tax was levied on these lands by the State, as will be seen by the references on page 22 of the brief of opposing counsel. To what, then, did the covenant, as to the payment of taxes, refer? No taxes were, or at that time had ever been, levied on such property either by State or borough, and of necessity the covenant was meant to apply not to taxes then in existence, but to any that might thereafter come into existence by the exercise of public authority. The fact, therefore, that no taxes were then levied by the borough on such land does not show, as

argued, that such taxes were not in contemplation of the parties. As well might it be contended the State taxes were not contemplated also because they, too, were not and never had been levied on such property at that time. The parties must have contemplated some taxes, or the covenant was meaningless, and it is clear that the public taxes meant were those to be levied under the authority of law whenever the State chose to exercise that authority. The parties knew that the State couldt subject the lands to taxation, both by the borough and by itself, and it was with this knowledge that this covenant was made by the lessee.

In addition to this the great object of the parties was that the borough should get its rent without diminution on account of other charges against the land leased by it; it was intended that the rent should be a *net* profit to the borough issuing out of the property, and it was under these circumstances that the covenant was made; in other words, the parties contracted with a full appreciation of the future possibility that this land would be taxed, and it was their purpose to place the burden of paying these taxes upon the lessee.

Not only is this true, but the ordinary meaning of the word "public" ambraces the taxes involved in this suit, and to sustain this contention we refer to the case of *Buffalo City Cemetery vs. City of Buffalo*, 46 N. Y., 506-510, wherein the court uses the following language:

> "We think that the current of the authorities in this State and in some of our sister States runs to this result; that *public* taxes, rates and assessments are those which are levied and taken out of the property of the person assessed for some public or general use or purpose in which he has no direct, mediate and peculiar interest; being exactions from him towards the expense of carrying on the government, either directly and in general that of the whole Commonwealth, or more mediately and particularly through the intervention of municipal corporations."

As to the contention that the City of Norfolk could not tax its own property, it may be said that there is no such rule of law. It is true that very frequently a city does not tax its own property because by so doing it would simply be paying some official a salary to collect money for itself, but when the reason for this ceases it will be found that the practice ceases also, and that when the city can derive a revenue by taxing its own property it always does so. The City of Norfolk possesses all the power of the State as to taxation (Norfolk *vs.* Norfolk Landmark, 95 Va., 564), and it is well settled that a taxing power can tax its own property if it sees fit. (See Cooley os Taxation (3d ed.), p. 263.)

There is a long note in 132 Amer. St. Rep., 291, showing that very frequently public property is subjected to taxation and that the question is often made to depend upon the use made of the property, the situation and location of the property, and the character or condition of the title of the governmental body in the land and on other facts.

It should be particularly noted here that there never was any agreement by the City of Norfolk that it would refrain from levying a tax on this property and nothing in the contract that forbids the levying of a tax thereon.

Indeed it would seem that the whole situation here is fully met by the case of *Wells vs. Savannah,* 181 U. S., 531, on which we especially rely, and which would seem to be a sufficient precedent for the affirmation of the judgment of the court below.

IV.

CONCLUSION.

The fact is that in this case there is absolutely no contract exempting plaintiffs in error from liability for these taxes, and it is only by the exercise of the utmost ingenuity that even a claim for such exemption can be produced.

The situation indeed makes most applicable here the language of Mr. Justice Clifford in the *North Missouri R. Company vs. McGuire,* 20 Wall., 46, wherein he holds that neither

> "*A lawful tax on a new subject* nor an increased tax on an old one interferes with the contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens on one class and release the burdens of another."

There were other questions in the case, but they are sufficiently disposed of in our brief before the Supreme Court of Appeals of Virginia, which is printed as a part of the record here, and we refer to that brief for what we have to say on those questions. We also call attention to the case of *White vs. City of Norfolk,* which is a companion case and follows this case immediately on the docket in this court, and to the brief therein.

Very respectfully,

NATHANIEL T. GREEN,
Counsel for The City of Norfolk, Virginia.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1910.

No. 104.

WILLIAM H. WHITE, Plaintiff in Error,

vs.

THE CITY OF NORFOLK, VIRGINIA, Defendant in Error.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 104.

WILLIAM H. WHITE, PLAINTIFF IN ERROR,

vs.

THE CITY OF NORFOLK, VIRGINIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

I.

STATEMENT OF FACTS.

In the year 1792 the City of Norfolk, then the Borough of Norfolk, being the owner of an area of land in the present City of Norfolk known as "Town Point Land," laid off said land under one general plan and leased said property under perpetual leases (that is, leases for 99 years, renewable forever) to various individuals, of whom one William Williams, through whom the plaintiff here claims, leased Lot

No. 9 of said Town Point Land. Said lands were leased by certain commissioners named by the Common Council of said city under a plan offered by one Campbell. The commissioners reported the terms and conditions on which they had leased said lands and on which they had leased Lot No. 9, herein involved, and among said conditions upon which said Lot No. 9 was leased was "that the public and other taxes accruing or to accrue on the several lots after this day are to be paid by lessees." After said report of said commissioners the proper authorities of the city or borough authorized the mayor to join with a committee from the Common Council in making the lease of said Lot No. 9 with other lots to other parties, and the Common Council appointed a committee to join with the mayor in making said leases "agreeable to the report made by the commissioners." In accordance with these proceedings in the year 1792 Lot No. 9 was leased for a period of 99 years, renewable forever, to William Williams, his executors, administrators, and assigns, in consideration of certain covenants and agreements and a yearly rent of 37 pounds, 7 shillings, and 6 pence. And among the covenants in said lease was one to the effect that the said Williams, his executors, administrators, and assigns, would pay or cause to be paid to the person or persons authorized to receive the same the "public and other taxes" which shall accrue on said land. In the year 1890 the Common Council of the City of Norfolk, after reciting that the lease to William Williams was about to expire and that Elizabeth F. Sergeant was then the owner of said lease and desired a renewal of the same *according to the terms thereof,* and had petitioned the councils accordingly, passed a resolution as follows:

> "Be it therefore resolved by the Common and Select Councils of the City of Norfolk, That the presidents of the Common and Select Councils of the City of Norfolk be, and they are hereby authorized and instructed to execute on behalf of the City of Norfolk,

as the legal successor of the Borough of Norfolk, a renewal of the said lease for another term of 99 years, renewable forever, *according to the terms thereof,* to the said George H. Sergeant, trustee (for Elizabeth G. Sergeant), his executors, administrators, and assigns in such form as may be approved by the city attorney; and that the said city treasurer be, and he is hereby, authorized and instructed to affix the seal of the City of Norfolk to the said renewal lease when the same shall have been so executed, and to deliver the same to the said Elizabeth F. Sergeant or her agent or attorney."

At a later date in said year the presidents of the Common and Select Councils of the City of Norfalk joined in a renewal lease, in which was recited in full the last aforementioned resolution of the councils, in strict accordance with said resolution, except that in the place of the covenant to pay all public and other taxes thereon the following covenant was inserted: "And further that the said George H. Sergeant, trustee as aforesaid, his successors and assigns, will pay or cause to be paid to the person or persons authorized to receive the same all taxes, State and national, which shall accrue on the said land. *And also will keep and perform each and all the other covenants in said original deed contained* (meaning thereby the original lease) and by the lessee therein named, his heirs and assigns to be kept and performed." And on the same date said George H. Sergeant, trustee, and Elizabeth F. Sergeant transferred said lease to W. H. White, the appellee.

On the Lot No. 9 herein involved improvements of great value have been placed, and in the year 1903 the City of Norfolk assessed said land for taxation to the City of Norfolk, and the building thereon to W. H. White, the appellee; and to prevent the collection of said taxes the bill was filed in this cause.

The Federal ground on which the plaintiff in error relies is that to hold him liable for these taxes would impair the obligation of the contract of lease now held by him.

II.

ARGUMENT.

This case involves the same questions as involved in the case of J. W. Perry Company and John L. Roper *vs.* City of Norfolk, No. 103 on the docket of this court, and just preceding this case. We refer to our brief in that case for discussion of those questions.

We beg also to accentuate the points made in that brief by calling attention to the fact that the whole basis of the argument made in both of said cases is upon the premise that the City of Norfolk had no right to levy a tax on its own property, although said property was not used for a governmental purpose but was leased for private purposes.

Whether the City of Norfolk could tax its own property is not a Federal question.

There is nothing in the contract of lease by which the City of Norfolk agreed not to tax its own property. The Court of Appeals of Virginia has decided that it can, and on this question this court will follow the Virginia court.

In addition to this, under section 183 of the present Constitution of Virginia, the city was obliged to tax the property. That section provides that no other property shall be exempt from taxation, *State and local,* except property directly owned by the State, however held, and property lawfully held and owned by counties, cities, towns, or districts used *wholly and exclusively for county, city, town, or public school purposes,* and certain other property not having any bearing upon the questions in this case. Not only is this true, but in said section of the Constitution it is further provided that "nothing therein contained shall be construed as authorizing or requiring any county, city or town to tax for county, city, or town purposes, *in violation of the rights of the lessee thereof existing under any lawful*

contract heretofore made, any real estate owned by such county, city, or town and heretofore leased by it." This demonstrates that unless it violates the contract with the lessee the city was required to tax property leased by it, and there is no violation of the contract of lease in this case.

As to the terms of renewal lease it is only necessary to repeat here what is said in our argument before the Supreme Court of Appeals of Virginia on this point.

It is clear that when said renewal lease was executed it was the intention of all the parties thereto that the terms and conditions thereof should be the same as those contained in said original lease, and especially that the covenant or condition contained in said original lease to the effect that the lessee would pay the public and all other taxes should also be contained in said renewal lease; and it is equally as clear from the recitation in said renewal lease of the resolution of the councils that the said W. H. White and his grantor took with knowledge of such intention and are bound thereby. And if this were not true, yet the covenant in the renewal lease now owned by said White, that he would "keep and perform each and all the other covenants in said original deed contained and by the lessee named therein, his heirs and assigns to be kept and performed" bound him to the covenant contained in the original lease to pay "all public and other taxes."

It is well to call attention to the point that certainly the building on this land was taxable to the lessee even under the general rule applicable to ordinary leases as to taxes between landlord and tenant. To say that the building erected by a tenant under such a lease as this *before default made and re-entry* becomes the property of the lessor is fallacious in the extreme and the courts have always held even under ordinary leases that increase in taxation due to the erection of improvements by the lessee, should, to the extent of such increase, be paid by the lessee during the term. In 18

Amer. & Eng. Enc. of law (2d ed.), p. 651, the general rule is laid down:

> "When the taxable value of the premises is greatly enhanced by improvements erected by the lessee, the lessor is not bound, between himself and his tenant, to pay the additional taxes caused by such improvements; and if he is required to pay such additional taxes he may compel the lessee to reimburse him."

If this were not true it would result, as pointed out in *Watson vs. Home,* 14 Eng. Com. Law, 45, that a tenant might so improve a lessor's property that the taxes would more than consume rents and the landlord, to speak in common parlance, would be in a hole. This principle has been recognized in Virginia in the case of *Mayo vs. Carrington,* 19 Gratt., 74, where the syllabus is as follows:

> "The leased property when sold was only valuable for the sand taken from it. The purchaser builds upon it and makes extensive improvements. He is entitled to deduct from the rent the taxes upon the property as he purchased it but not the taxes occasioned by his improvements."
>
> See also 24 Cyc., p. 1075, n. 65.

The exact distinction we make here as to the building has been made in Louisiana in the case of Burbank *vs.* Board, 27 Sou., 947, the syllabus of which is as follows:

> "The plaintiff as lessee of the City of New Orleans having contracted to build upon two vacant and unimproved lots of ground certain specified buildings, as a part of the consideration of the lease in addition to money rent, *the buildings to revert to the lessor on the termination of the lease at the expiration of twenty years, said buildings and improvements are subject to taxation by the city in the meantime.*"

This last case sustains our contention entirely that, *during the currency of the lease at any rate,* the buildings are the property of the lessee and he should pay taxes thereon.

It may be well also to observe at this point that the city could not increase its rate in levying this tax by placing upon the property any amount of tax it wished to. It had necessarily under the law to tax it at the same rate that was imposed on other real estate in the city based upon its value in the assessment for taxation for State purposes.

As to whether the building was properly assessed separately from the land does not involve a Federal question but a matter of local law, and is not subject to review by this court.

We conclude our observations on this contention by a reference to the case of Hart *vs.* Cornwall, 14 Conn., 228, which is almost identical on this point. In that case the legislature of Connecticut had granted the town of Cornwall a tract of land for the use of the ministry forever. About twelve years after this grant the town of Cornwall leased the land for the term of 999 years, free of all incumbrances, except all rents or public taxes that might arise thereon to be paid and satisfied by the lessee. The town taxed this land and a question arose as to the right of the town to tax. It seems that the town of Cornwall had the same power in Connecticut that the town of Norfolk has in Virginia. (*Norfolk vs. Norfolk Landmark Company,* 95 Va., 564.) See opinion in the Cornwall case, pages 233-234, and the court held that inasmuch as the State could tax it the city could tax it.

III.

CONCLUSION.

We have repeated in this brief a great deal of what was said in our brief in the Virginia Supreme Court of Appeals, and we call attention to that brief for a more detailed argument of the questions.

Very respectfully,

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Counsel for The City of Norfolk, Virginia.